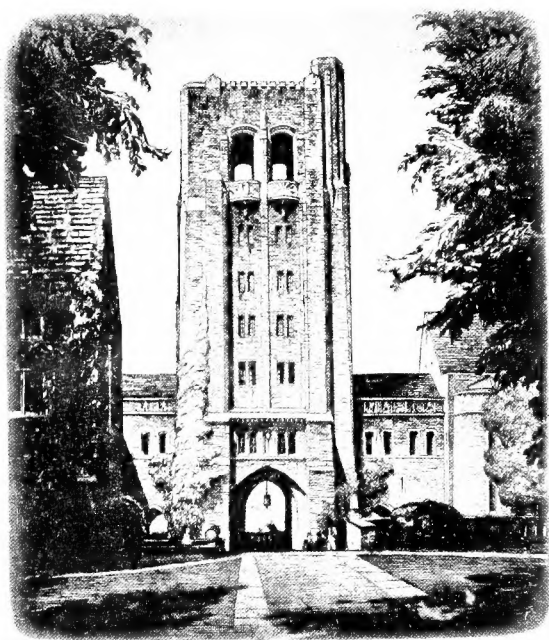




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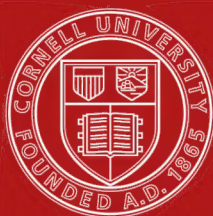
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TREATISE

ON

Attorneys and Counsellors at Law

COMPRISING THE

Rules and Legal Principles Applicable to the
Vocation of the Lawyer, and those
Governing the Relation of
Attorney and Client.

BY

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Vide 13 Amer. Law Review 358

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PREFACE.

Am. Law. Review 338

Except incidentally, the rules and legal principles governing attorneys and counsellors at law in their vocation and in their professional relations with their clients, have hitherto met with but little attention from law writers. I believe there is not now in general use any work especially devoted to the subject, and no one has, so far as I am aware, either professed or attempted to take an exhaustive view of this branch of the law. Yet a table of some five thousand cases, cited in this volume, and nearly all of which are in some way directly applicable to attorneys and counsellors at law, should seem to indicate that questions in regard to the subject-matter have commanded the attention and called for the adjudication of courts with considerable frequency; and that lawyers have been in the past, and doubtless will be in the future, by no means exempt from litigation wherein they figure not as attorneys alone, but as parties litigant, by reason of their profession. It has occurred to the writer that an exclusive treatise, attempting to present the law governing the attorney as an officer of the court and as the representative of his client, would be of convenience to the profession, and perhaps in some degree lessen its labors, and assist its members in arriving more readily at a just ascertainment of their own rights and liabilities, in their relations to court and client.

The reader will perhaps be not displeased if the general design of the work is now disclosed in its more prominent outlines.

The book commences with an historical sketch, and Chapter I is devoted to definitions and classifications. Without making a formal division in the volume, it is as a matter of fact divided into two several parts. The first is devoted to a consideration of the *vocation* of the lawyer regarded as a vocation, or an office merely, and separate and distinct from the subjects arising out of the *relation* between the lawyer and his client. In treating of the vocation of the lawyer, the first

group of subjects claiming attention, pursuing the natural order of the subject-matter, is the following :

1st. The general nature of the office, and what are the requisite qualifications entitling an applicant to become a member of the bar. 2d. These matters reviewed and the qualifications being found to exist, and their nature ascertained, *Admission* to the Bar is considered, and the Rules and Regulations governing that admission; and 3d. As the counterpart of this subject—Removal and Suspension from the Bar, Striking from the Roll, and generally the offenses and improprieties which will authorize the infliction of these punishments and call for the exercise of the summary jurisdiction of the Courts over attorneys. These topics are covered by Chapters II, III, and IV.

After Admission to the Bar, there are certain privileges, disabilities, and liabilities to third persons, connected with the attorney's profession and incident to his office, rather than to his relation to his client. The second group of subjects, therefore, falling under the general head of the Lawyer's Vocation, comprises these three matters, and includes Chapters V, VI, and VII.

After a review of the law in relation to the attorney as a member of a certain profession, his vocation as contradistinguished from his relative duties to and liability arising from his relations with his client, we have next to consider what may, perhaps, not inappropriately be called the Law of Attorney and Client. Endeavoring still to pursue the natural order, we will suppose that the client in need of professional assistance has sought out his legal adviser. The relation between them usually opens with a statement on the part of the client of the nature of the business on which he has come. In other words, he "lays his case," or his business, whatever it is, before his counsel. In doing this he necessarily makes many disclosures of a private and confidential nature—disclosures which are known to the law as *Privileged Communications*. We shall pause here, before the business between the attorney and his client has attained any further progress, to inquire what communications the client may safely make to his counsel, with the absolute confidence that, as a question of law, the guaranty of inviolable secrecy is cast over them—that neither the attorney nor his client can in future be compelled, nor the attorney al-

lowed in judicial proceedings, to draw aside the veil which the law has thrown over them, and expose them to public examination and scrutiny. This inquiry is made in Chapter VIII.

The business having been laid before the attorney, and the client being desirous of employing him, and the attorney consenting to act, he is retained by the client. The next thing, therefore, is the *retainer* of the counsel and his authority to appear, and the legal results which flow therefrom. This is included in Chapter IX. As the result of the retainer, the attorney is invested with certain authority and clothed with certain powers, which it will next become necessary to consider. This will include a statement as to how the authority may be revoked or terminated by death of the client or attorney, by change and substitution, etc. Chapter X is a discussion of these things.

The next question which arises is, How shall the attorney fulfill the trust imposed upon him, and what duties are incumbent upon him in the dealings between him and his client? This includes the attorney's general duties and his dealings with his client, and embraces Chapter XI. The remedy of the client against the attorney is a correlative subject with the duties of an attorney toward his client and his dealings with him. There are certain rights which the client possesses as against the attorney, and certain remedies for the infringement of those rights. We have then next to consider the Rights and Remedies of Clients as against their counsel, the liability of the attorney to his client, and herein of negligence and its consequences. This is done in Chapter XII.

We are now to suppose that the business of the attorney with his client is closed, or about to close, or that it has attained a sufficient progress to entitle the attorney to compensation for his services rendered. This leads us to discuss the Rights and Remedies of the Attorney against his Client, and herein of actions for fees, and the lien of the attorney upon funds and documents in his hands to secure his compensation. These matters are treated of in Chapter XIII, and conclude the work, which is respectfully submitted to the profession for whose use it is chiefly intended, and concerning which it treats.

SACRAMENTO, June, 1878.

TABLE OF CONTENTS.

INTRODUCTION.

- § 1. Preliminary.
- § 2. The Athenian courts.
- § 3. Roman judges, advocâtes, etc.
 - § 4. Patron and client.
 - § 5. The jurisconsults.
 - § 6. The Roman lawyers under the empire.
- § 7. Lawyers in the Middle Ages.
- § 8. The bar in France.
- § 9. The modern bar of France.
 - § 10. *Avoués* and *avocats*.
 - § 11. Qualifications for admission.
 - § 12. Appointment of attorneys.
 - § 13. Discipline and independence of the French bar.
- § 14. Advocates in England.
 - § 15. The Inns of Court.
 - § 16. Regulations as to legal education.
 - § 17. Admission of students.
 - § 18. Keeping terms.
 - § 19. Calling to the bar.
 - § 20. Certificates to practice under the bar.
 - § 21. Lectures and examinations.
- § 22. Lawyers in Scotland.
- § 23. The profession in the United States.
- § 24. Legal instruction in the United States.
- § 25. Difference between the English and American bar.

CHAPTER I.

DEFINITIONS AND CLASSIFICATIONS—USE OF TERMS

- § 26. Different designations applied to lawyers.
- § 27. Advocates—Civil law, ancient and modern.
- § 28. Attorneys at law.
- § 29. Barristers.
- § 30. Counsel.
- § 31. Lawyers.
- § 32. Proctors.

- § 33. Serjeants at law.
- § 34. Solicitors.
- § 35. Use of terms.

CHAPTER II.

THE VOCATION OF THE LAWYER—GENERAL NATURE OF HIS OFFICE—QUALIFICATIONS.

- § 36. The lawyer's vocation.
- § 37. Character of the office.
- § 38. Test-oath cases in the United States Supreme Court.
- § 39. And in California.
- § 40. Who may be attorneys—Admission of women as attorneys.
- § 41. Taxation of the profession.

CHAPTER III.

ADMISSION TO PRACTICE.

- § 42. Admission.
- § 43. Admission and permission to practice essential.
- § 44. Old regulations as to admission and practice in England.
- § 45. The articled clerks of England—Persons contracting.
 - § 46. Service under the articles.
 - § 47. Continuous service.
 - § 48. Holding other offices.
 - § 49. Service under partners.
 - § 50. Affidavit necessary.
 - § 51. Assignment and discharge of articles.
 - § 52. Disputes between clerk and master.
- § 53. The application and admission to practice under the English system.
- § 54. Examination and admission of attorneys under the English system.
 - § 55. The certificate.
 - § 56. Registration of names.
 - § 57. Practicing in the names of each other.
 - § 58. Effect of want of qualification.
- § 59. Readmission.
- § 60. Statutory regulations in England.
- § 61. Solicitors under the Supreme Court of Judicature Acts.
- § 62. Colonial Attorneys Relief Act, 1874.
- § 63. Statutory regulations in Ireland.
- § 64. Statutory regulations in Scotland.
- § 65. Statutory regulations and rules in the United States.
- § 66. In the United States Supreme Court.
- §§ 67-76. In the State Supreme Courts.

CHAPTER IV.

SUMMARY JURISDICTION OF COURTS OVER ATTORNEYS—STRIKING FROM THE ROLLS—SUSPENSION FROM PRACTICE—ATTACHMENT—CONTEMPT—ETC.

- § 77. Liability to summary jurisdiction.
- § 78. Liability on undertakings.
- § 79. For acting without authority.
- § 80. Striking from the rolls.
- § 81. Instances of misconduct authorizing suspension or disbarring.
- § 82. Restoration.
- § 83. Practice.
- § 84. Whether mandamus will lie.
- § 85. Striking from rolls for defect in articles.
- § 86. Barratry.
- § 87. Maintenance.
- § 88. Champerty.
- § 89. Striking from the rolls at attorney's own request.
- § 90. Responsibility of the judiciary in civil actions for striking an attorney's name from the rolls.
- § 91. Compelling disclosure as to abode or occupation of client—Requiring attorney to produce client.
- § 92. Delivery up of documents.
- § 93. Papers in attorney's hands for professional purposes.
- § 94. Compelling payment of money.
- § 95. Summarily imposing costs.
- § 96. Answering matters of affidavit.
- § 97. Contempts—Attachments against attorneys.
- § 98. Contempts in the United States courts.
- § 99. Miscellaneous offenses.
- §§ 100-105. Statutory regulations.

CHAPTER V.

PRIVILEGES OF ATTORNEYS AS OFFICERS OF THE COURT—EXEMPTIONS.

- § 106. Privilege in general.
- § 107. Privilege from arrest.
- § 108. Privilege as to suing and being sued.
- § 109. Waiver of privilege.
- § 110. Privilege of counsel in argument.
 - § 111. Under control of the court.
 - § 112. Argument to be confined to the evidence.
 - § 113. Comments on persons and their actions.
 - § 114. Argument on the law.
 - § 115. Limiting time of argument.
 - § 116. Responsibility of counsel in argument.
 - § 117. Publication of argument.

CHAPTER VI.

DISABILITIES OF ATTORNEYS BY REASON OF THEIR PROFESSION.

- § 118. Disabilities of attorneys.
- § 119. Restrictions as to becoming bail or surety.
- § 120. As to appearing for both parties, or on opposite sides.
- § 121. As to purchasing choses in action or demands for suit.
- § 122. As to acting in other capacities.
- § 123. As to acting for unqualified persons, and permitting others to use their names.
- § 124. When counsel in a cause may be a witness.
- § 125. Competency as a witness generally.
- § 126. Opinions as an expert on matters connected with his specialty.

CHAPTER VII.

ATTORNEY'S LIABILITY TO THIRD PARTIES.

- § 127. General liability to third persons.
- § 128. Liability for fees and costs.
- § 129. Liability for indorsement of the writ.
- § 130. Liability on undertakings.
- § 131. For excess of authority.
- § 132. In cases of malpractice.
- § 133. Liability for acts done—Malicious prosecution by attorney.
- § 134. Joint liability of attorney and client.
- § 135. Liability of third persons to attorneys.
 - § 136. As for slander of attorneys.
 - § 137. Expressions held slanderous.
 - § 138. Expressions held not slanderous.
 - § 139. Other expressions.
 - § 140. The evidence.

CHAPTER VIII.

THE PRIVILEGE OF PROFESSIONAL COMMUNICATIONS.

- § 141. Relative duties.
- § 142. Origin of the rule as to privileged communications.
- § 143. Rule not confined to pending suits.
- § 144. General rules.
- § 145. Rule in the Federal Courts.
- § 146. Rule in equity causes.
- § 147. Burden of proof.
- § 148. Importance of communication not a test.

- § 149. Injunction of secrecy not necessary.
- § 150. Communications held privileged.
- § 151. Communications held not privileged.
- § 152. Disclosures allowed for protection of attorneys.
- § 153. Professional employment necessary.
- § 154. But a formal retainer not necessary.
- § 155. Mode of imparting privileged information.
- § 156. Effect of the client's calling the attorney as a witness.
- § 157. Right of cross-examination of attorney.
- § 158. Effect of attorney making himself attesting witness.
- § 159. Effect of the presence of both parties.
- § 160. What persons the privilege includes.
- § 161. Clerks, interpreters, conveyancers.
- § 162. Client also protected from testifying.
- § 163. Rule as applied to documents.
 - § 164. Deeds.
 - § 165. Testamentary communications.
 - § 166. Fraudulent transactions.
 - § 167. Admissions.
 - § 168. Acts done.
 - § 169. Matters observed.
 - § 170. Communications in view of breaking the law.
 - § 171. Collateral matters.
 - § 172. Third parties.
 - § 173. Disclosing address of client.
- § 174. Privilege not lost by termination of professional relation.
- § 175. Communications made to legal advisers of two parties jointly.
- § 176. Correspondence between co-defendants.
- § 177. Waiver of the privilege.
- § 178. Propositions to compromise.
- § 179. Information received extra professionally.
- § 180. Information not within the scope of professional duty.
- § 181. Rule in criminal cases.
- § 182. Course for attorney to pursue when subpoenaed.

CHAPTER IX.

RETAINER, AND AUTHORITY TO APPEAR—APPEARANCE.

I.—RETAINER.

- § 183. Commencement of the professional relation.
- § 184. The right to counsel.
- § 185. Establishing the relation of attorney and client.
- § 186. The retainer—written or parol.
- § 187. Contract of retainer.
- § 188. General and special employment.
- § 189. Retainer by one as agent for another.
- § 190. Retainer by corporations.
- § 191. Effect of dissolution of partnership on retainer.
- § 192. Effect of death of party on retainer.

II.—AUTHORITY TO APPEAR—APPEARANCE.

- § 193. Ancient mode of appearance.
- § 194. Appearance at the civil law.
- § 195. General license by reason of admission.
- § 196. Presumption of authority to appear.
- § 197. Adverse party may presume authority.
- § 198. Denial of authority—requiring its production.
- § 199. Effect of authorized appearance.
- § 200. Unauthorized appearance—dismissal of suit.
- § 201. Judgments obtained through unauthorized appearance.
- § 202. Interference with judgment by Court of Equity.
- § 203. Collateral attack.
- § 204. Unauthorized appearance—foreign and domestic judgments.
- § 205. Effect of unauthorized appearance on innocent third parties.
- § 206. Question of attorney's pecuniary responsibility.
- § 207. Laches.
- § 208. Appearance for a portion of several parties or for all parties.
- § 209. Appearance for a partnership.
- § 210. Appearance by attorney in appellate courts.
- § 211. Defendant's remedy against attorney.
- § 212. Remedy of the party whose name is used.
- § 213. Withdrawal of appearance.
- § 214. Practice.

CHAPTER X.

AUTHORITY AND POWERS OF ATTORNEYS BY VIRTUE OF THEIR
RETAINER.

- § 215. Results flowing from the retainer.
- § 216. Law of principal and agent applicable.
- § 217. Authority and powers.
- § 218. Things that an attorney may do by virtue of his general retainer.
- § 219. Things an attorney may not do by virtue of his retainer without special authority.
- § 220. Control over conduct of suits and proceedings.
- § 221. When attorney may exercise his discretion.
- § 222. Binding effect of attorney's acts as against the adverse party.
- § 223. Authority to make admissions binding upon the client.
 - § 224. Implied admissions.
 - § 225. Attorney's admissions to prove his own authority.
 - § 226. Admissions of clerks, etc.
 - § 227. Recalling admissions before judgment.
- § 228. Authority to compromise litigated claims, and to make settlements
 - § 229. Negligent compromise.
 - § 230. Notice of want of authority to compromise.
 - § 231. No compromise after judgment.
- § 232. Authority to demand and receive payment.
- § 233. Authority to refer or submit to arbitration.
- § 234. Collateral matters.

- § 235. Authority to stipulate that cause of action shall not abate.
- § 236. Authority to stipulate for continuance.
- § 237. Authority to receive notices.
- § 238. Effect of judgment on authority.
- § 239. Control over judgment and execution.
- § 240. Authority to satisfy judgment.
- § 241. Vacating judgment.
- § 242. Authority after judgment.
- § 243. Auxiliary proceedings.
- § 244. Authority of law partners.
- § 245. Authority of law clerks.
- § 246. Authority to employ substitutes.
- § 247. Ratification by the client.
- § 248. Duration of authority.
- § 249. Termination of the relation and of the authority.
 - § 250. By revocation of authority, and change and substitution of the attorney—General rules.
 - § 251. In England.
 - § 252. In United States.
 - § 253. Change after judgment.
 - § 254. Effect of the substitution on the attorney changed.
 - § 255. By withdrawal of attorney.
 - § 256. By death of attorney or client.

CHAPTER XI.

DUTIES OF ATTORNEYS TOWARDS CLIENTS—DEALINGS WITH THEM.

I.—DUTIES TOWARDS CLIENT.

- § 257. How the attorney is to fulfill his trust.
- § 258. Degree of fairness and good faith required.
- § 259. Legal duties towards client.
- § 260. Duty of disclosing adverse retainer.
- § 261. Duties in preparing for trial.
- § 262. Duty as to notifying client as to rendering accounts.
- § 263. Duties in collecting money.
- § 264. Payment of money.
- § 265. Duties as to sales of real property—employment by both parties.
- § 266. What the attorney undertakes to do in making a purchase.
- § 267. Duties as to investigating titles.

II.—DEALINGS WITH CLIENT.

- § 268. Dealings with client.
- § 269. Transactions upheld.
- § 270. Transactions not upheld.
- § 271. Conflicting interests.
- § 272. Mixing funds.
- § 273. Purchase of client's property.
- § 274. Instances.

- § 275. Exceptions to the rule.
- § 276. Extortionate agreements.
- § 277. Purchase of subject-matter of controversy.
- § 278. Purchase of claims.
- § 279. Information received from client.
- § 280. Investment of moneys.
- § 281. Gifts from client.
- § 282. Rendering accounts.

CHAPTER XII.

LIABILITY OF ATTORNEYS TO THEIR CLIENTS—NEGLIGENCE —REMEDIES OF CLIENTS AGAINST THEIR ATTORNEYS BY AC- TION, ETC.

- § 283. Liability to client.
- § 284. What skill, care, and diligence required.
- § 285. Skill required.
 - § 286. Liability for mistakes.
 - § 287. Liability for blunders in process, and formal proceedings.
 - § 288. Liability for ignorance of the law.
 - § 289. Effect of locality on the rule.
 - § 290. Attorney not expected to guarantee success.
- § 291. Care required.
- § 292. Diligence required.
- § 293. Liability for negligence.
 - § 294. Neglect of attorney is neglect of client as to third parties.
 - § 295. Usual remedy.
 - § 296. Legal and equitable actions.
 - § 297. Negligence in conduct of a cause.
 - § 298. Position of burden of proof in cases of negligence.
 - § 299. Instances of negligence.
 - § 300. Pleading and evidence in actions for negligence.
 - § 301. Sufficient count in an action for negligence.
 - § 302. Negligence as a defense to an action for fees.
 - § 303. Negligence of associates.
- § 304. Liability for matters not litigated.
- § 305. Liability for acting in excess of authority.
- § 306. Liability for acting without authority.
- § 307. Collection and appropriation of money.
- § 308. Payment of money.
- § 309. Accounting and payment.
- § 310. Liability for disclosing secrets.
- § 311. Investigation of titles—Investment of money—Sufficiency of securities.
- § 312. Advice as to titles.
- § 313. Effect of nonpayment of fees.
- § 314. Liability of law-partners.
- § 315. Attorneys' books.
- § 316. Liability for abandonment of suit.
- § 317. Other liabilities.

- § 318. Not liable for acts not within the scope of their profession.
- § 319. Measure of damages.
- § 320. Statute of Limitations.

CHAPTER XIII.

LIABILITY OF CLIENTS TO ATTORNEYS — COMPENSATION OF ATTORNEYS FOR SERVICES RENDERED — REMEDIES OF ATTORNEYS AGAINST CLIENTS TO RECOVER OR SECURE COMPENSATION — REMEDY BY ACTION — REMEDY BY LIEN.

I.—REMEDY BY ACTION.

- § 321. The Roman *Honorarium*.
- § 322. In the Middle Ages.
- § 323. In England.
 - § 324. Solicitors' fees under the Judicature Acts.
 - § 325. Solicitors' fees in England under agreements.
 - § 326. Bills of cost, under the English system.
 - § 327. Delivery of the bill.
 - § 328. Requisites of the bill.
 - § 329. Propriety of the charges.
 - § 330. Liability to be taxed.
 - § 331. Referring bill to taxation.
 - § 332. Taxation of bill independent of statutory provisions.
- § 333. Compensation in the United States.
- § 334. Compensation under general retainer.
- § 335. Actions for compensation.
 - § 336. Liability of client.
 - § 337. Implied obligation.
 - § 338. Pleading and proof.
 - § 339. Proving retainer—Evidence of employment.
 - § 340. Evidence for plaintiff.
 - § 341. Evidence for defendant.
 - § 342. Attorneys' services—when considered as necessities.
 - § 343. Measure of compensation.
 - § 344. Statute of Limitations.
- § 345. Compensation under special agreement.
 - § 346. Express contract.
 - § 347. Assignment of debt.
 - § 348. Agreement for fixed sum in gross.
 - § 349. Promissory note for services.
- § 350. Contingent or conditional fees—Champerty.
 - § 351. Contracts held champertous.
 - § 352. Contracts held not champertous.
 - § 353. Maintenance and barratry.
 - § 354. Contingent fee not within the Statute of Frauds.
 - § 355. Right to contingent fee as against attaching creditor.
 - § 356. Contract of indemnity.
 - § 357. Merger of the contract.
 - § 358. Death of client.
 - § 359. Commissions for collecting.

- § 360. Fraudulent assignments.
- § 361. Measure of damages.
- § 362. Compensation of substitutes.
- § 363. Taking new security for fees pending relation.
- § 364. Making new contracts for fees after retainer.
- § 365. Effect of withdrawal from case.
- § 366. Effect of dismissal of case.
- § 367. Effect of change of attorney.

II.—THE REMEDY BY LIEN.

- § 368. Lien of attorney.
- § 369. Two kinds of lien—general and particular.
- § 370. The particular or charging lien.
- § 371. The general lien.
- § 372. The so-called “retaining lien.”
- § 373. Lien on papers.
- § 374. Summary jurisdiction over delivery of papers as affecting the lien.
- § 375. Waiver or loss of the lien.
 - § 376. When superseded.
 - § 377. Collusive settlements.
- § 378. Remedies on the lien.
 - § 379. Equitable interference to protect the lien.
 - § 380. Set-off as against lien.
 - § 381. Appropriation of payments on account.
- § 382. Settlements between the parties as affecting the lien.
- § 383. Liens on partnership debts.
- § 384. Liens on sums awarded.

INTRODUCTION.

- § 1. Preliminary.
- § 2. The Athenian courts.
- § 3. Roman judges, advocates, etc.
 - § 4. Patron and client.
 - § 5. The jurisconsults.
 - § 6. The Roman lawyers under the empire.
- § 7. Lawyers in the Middle Ages.
- § 8. The bar in France.
- § 9. The modern bar of France.
 - § 10. *Avoués* and *avocats*.
 - § 11. Qualifications for admission.
 - § 12. Appointment of attorneys.
 - § 13. Discipline and independence of the French bar.
- § 14. Advocates in England.
 - § 15. The Inns of Court.
 - § 16. Regulations as to legal education.
 - § 17. Admission of students.
 - § 18. Keeping terms.
 - § 19. Calling to the bar.
 - § 20. Certificates to practice under the bar.
 - § 21. Lectures and examinations.
- § 22. Lawyers in Scotland.
- § 23. The profession in the United States.
- § 24. Legal instruction in the United States.
- § 25. Difference between the English and American bar.

§ 1. **Preliminary.**—To illustrate the origin of some of the rules which have obtained in modern times in regard to members of the legal profession, it is designed to give a brief historical sketch of the lawyers of the earlier periods of the world's history. Obviously, nothing but a sketch is appropriate in what the author has endeavored to make a law text-book. For elaborate and extended historical research, the reader must look elsewhere, and to those volumes in which is unfolded the full history of the bar and the judiciary of Greece and Rome and of early France, of the times of the Roman Republic and the Empire, of the times of Constantine and of Charlemagne. But
A. & C.—1.

a brief historical introduction may be of service in the perusal of the pages of this book, as showing the origin of some of the peculiar principles which have governed the profession, especially in England. For instance, in that country, and for a long period, no barrister or advocate has been allowed to sue for compensation for his services. The theory is that his office is simply one of honor and dignity, and not of profit, and that what he receives must be by way of voluntary and honorary gift. The practical result is that he generally, in some way, secures his compensation at the commencement of his employment. The rule is apparently a relic of the old relation between the Roman advocate, or *patronus*, and his client. The reason of the rule has, to a great extent, passed away, but the rule itself remains.

§ 2. The Athenian courts.—Among the Athenians it does not appear that there was any distinct class of men whose peculiar office it was to speak on behalf of parties in courts of justice. The practice was not uniform, but the rule generally seems to have been that a speaker was not allowed to appear as an advocate unless he had some interest in the cause itself. But although originally parties were not allowed to avail themselves of the assistance of advocates to plead their causes for them, this rule was so far relaxed in after times that a relative or friend was permitted to speak in their behalf if they were prevented by illness, or other inability, from conducting their own causes. The employment of advocates proper was not usual. The persons at Athens who corresponded most nearly to advocates of modern times, were not speakers in the courts, but those who composed speeches for clients, to be delivered by the parties themselves, in their own causes, as in the case of courts-martial. This was the ordinary occupation of a class of distinguished men at Athens.

§ 3. Roman judges, advocates, etc.—In the earliest times, the kings of Rome themselves presided at the trials, as was sometimes the case in France in the Middle Ages; but after the expulsion of the kings this jurisdiction was exercised by the consuls, and subsequently, and down to a very late period

in Roman history, by the prætors. Their number was originally two, and they were called *prætor urbanus* and *prætor peregrinus*; but afterwards they were increased, and the number varied at different periods. In the time of Cicero there seem to have been twelve. The exact number in the later ages of the republic has been a matter of much controversy.¹ They did not, however, personally attend the hearing of all the causes, and give judgment themselves, but were empowered, and in many cases obliged by law, to appoint judges for the purpose. When the prætor tried causes, he was said *cognoscere*, either *de tribunali*, or *de plano*. The former term was used when he sat upon a raised seat or tribunal, and heard the case formally argued before him; the latter when, as was frequently the case, he administered the law in a more familiar manner, conversing with the parties, and standing upon the same level with them. The disputes so heard he generally determined on the spot.²

When the prætor held his court *de tribunali*, he summoned to his aid a number of assessors called *judices*, who sat on each side of him, a little behind his seat; they were selected on ordinary occasions out of the centumviral body, who formed a kind of judicial college at Rome. In the courts of the centumviri were tried causes involving the most dry and technical points of law. Questions were there discussed relating to adverse possession, guardian and ward, pedigree, law of debtor and creditor, party-walls, ancient lights, easements, the validity of wills, etc.

The criminal causes were among others: 1. *Actiones populares*. These were trials appointed at the instance of the prætor for the punishment of the lower grades of misdemeanors, and chiefly such as were offenses against municipal and sanitary regulations. Any person might be a prosecutor, and the penalty of a fine was generally imposed. 2. *Actiones extraordinariæ*, or *judicia extraordinaria*, apparently embracing such crimes as were not specially provided against by any particular law, or to which no particular punishment was affixed; but it was left to the discretion of the tribunal, which was itself

¹ Polleti, *Hist. Fori Romani*, lib. 1, c. 5; Forsyth's *Hortensius*, 77.

² *Ibid.*; Heinecc. *Syntag.*, lib. 4, tit. 6.

of a special nature, and appointed for the occasion, consisting sometimes of the whole senate, sometimes of the consuls, or other magistrates, as the case might be.

But the prætor did not sit as a judge, in our sense of the word, at trials; he acted as the president of the court, under whose auspices and authority the proceedings were conducted; but he appears to have had no voice in the sentence. This power belonged to the *judices*, who were summoned by him to sit upon the trial, and of whom we find such constant mention made in the speeches and writings of Cicero. Their names were inscribed on a list or sort of jury panel, *Album Judicum*. Their number varied at different times; they seem at first to have been confined exclusively to the senatorian body; but by the Sempronian law, (B. C. 123) of which Tiberius Gracchus was the author, this right or privilege was transferred from the senators to the equestrian order; and the latter enjoyed it for nearly fifty years until Sylla (B. C. 80) deprived them of it, and restored it to the senators. By a later law, *Aurelia Lex*, passed B. C. 70, it was enacted that the *judices* should be chosen from the senators, the knights, and the *tribuni ærarii*, the last of whom were taken from the body of the people. These formed the three *decuriæ* of judges, which existed until Julius Cæsar reduced them to two by removing the *decuriæ* of the *tribuni ærarii*. The number that sat at a trial seems to have varied from fifty to seventy. After the reign of Augustus, the *Album Judicum* contained the names of all who were qualified to serve either on civil or criminal trials, and these amounted to some four thousand.¹

§ 4. The Roman lawyer, patron, and client.—Having given a slight sketch of the constitution of the Roman courts and tribunals before which the Roman lawyer practiced, it remains now to give a brief account of the advocates themselves. In Rome, there was no particular line of demarkation drawn between the advocate and the statesman. While appearing in the cause of his client, the speaker was in fact acquiring that popularity and influence which placed all public honors within his

¹ Forsyth, Hortensius, 78, 79, 82.

grasp. He was not obliged to devote himself for years exclusively to legal studies before he dared to enter the courts, or into public life. The more technical name given to those who practiced in the courts at Rome was that of *patroni causarum*, or simply *patroni*, and the parties whom they there represented were called their *clientes*. "How the clientship arose," says Niebuhr, "admits as little of an historical exposition as the origin of Rome. But all, however different in rank and consequence, were entitled to paternal protection from the patron; he was bound to relieve their distress, to *appear for them in court, to expound the law to them, civil and pontifical*: on the other hand, the clients were obliged to be heartily dutiful and obedient to their patron; to promote his honor; to pay his mulcts and fines; to aid him, jointly with the members of his house, in bearing burdens for the commonwealth, and defraying the charges of public offices; to contribute to the portioning of his daughters, and to ransom him or whoever of his family might fall into an enemy's hands."¹

The term *advocatus* was not applied to a pleader in the courts until after the time of Cicero. Its proper signification was that of a friend who, by his presence at a trial, gave countenance and support to the accused. It was always considered a matter of the greatest importance that a party who had to answer a criminal charge should appear with as many friends and partisans as possible, answering a double purpose, that of witnesses to character, while by their numbers and influence they materially affected the decision of the tribunal.

In the early ages of the republic the litigants appeared personally in court and carried on the cause themselves. They were not allowed to nominate another to act as their attorney in their behalf, except in three cases: *pro populo*, *pro libertate*, *pro pupillo*—i. e., in actions where the whole community was concerned, or where some question of personal liberty or guardianship was involved. The inconvenience, however, of this rule, led to the substitution of persons who, under the names of *cognitores* and *procuratores*, performed functions bearing some resemblance to those of attorneys of the present day. The

¹ Niebuhr, *History of Rome*, vol. 1, 277, 279.

cognitor appears to have acted for and managed the causes of parties resident at Rome, while the *procurator* was appointed in the place of one who was out of Italy, or whose absence from the city was caused by some public duty.¹

§ 5. **The juriconsults.**—Besides the *patroni causarum*, there was another important class of lawyers at Rome, called *juris consulti*, somewhat analogous to modern chamber counsel. These lawyers, when applied to by parties, expounded the doctrines of the law and informed their fellow-citizens of their rights and liabilities. Their houses were frequented for this purpose, and some of them had great reputation. When it was known that they were willing and competent to deliver opinions on points of law, they were often addressed in public by their clients, and walked up and down the forum consulting with them.²

The introduction to the forum, or “calling to the bar,” was observed as an important epoch of life. At the age of seventeen the student laid aside his boyish dress (*prætexta*) and assumed the *toga virilis*. He then proceeded to the forum, attended by his friends, and was there brought forward by some distinguished citizen, generally of consular rank, and formally introduced as a practitioner in the courts of law. After this, he might at once undertake the conduct of causes.

The profession of a juriconsult was, in some families, hereditary. They devoted themselves to the study of the law for the sake of the emoluments they were thereby enabled to acquire. Their opinions were often given gratuitously, as a means of acquiring popularity and influence, but there appears to have been no law, as in the case of the advocates, against their being paid by fees. The distinction between the advocates and the *juriconsults* was not unlike the distinction in modern times between the eloquent criminal lawyer, whose power of speech and capacity of appealing to the sympathies and passions of juries render a deep knowledge of law unnecessary, whether he has it or not, and the busy civil lawyer, who spends the most of his time in

¹ Forsyth, Hortensius, 83, 84, 86.

² Niebuhr, Lect. 2, 18; Forsyth, Hortensius, 88.

his chambers immersed in law and the business affairs of men, yet seldom, perhaps, appearing in trials in open court.

The Roman courts being a mixture of a court and a jury, great latitude was allowed to the advocates, who made every variety of appeal, to passion, prejudice, friendship, and enmity; appeals, whether frequent or otherwise, totally out of place in any modern court, when addressed to the judges. The Roman courts were not tribunals whose object was simply to discover whether a person was guilty or not, and where a higher power might step in and exercise a pardoning or mitigating function. The judges in Rome had stepped into the places of the people, who formerly judged in the popular courts, and they pronounced their sentence in the capacity of sovereign. The pardoning power, therefore, manifested itself in the courts. Hence it was that, under the influence of pity or compassion, an accused was often acquitted, totally irrespective of the question of his guilt or innocence. This is not strange when the constitution of the Roman courts is taken into consideration.¹

§ 6. Roman lawyers under the empire.—Numerous regulations were made in the Code Justinian as to advocates. Among their privileges they were exempted from many offices and burdens imposed upon others. After ceasing to exercise their profession, they were admitted to the order of *comites* (or counts) of the first rank, and numbered among the *clarissimi* of the State. Under the Roman law, the father, until the sons were legally emancipated from his control, had absolute power over the property of the latter. Whatever a son might earn by his own exertions, so long as he remained unemancipated, was the property of the father. An exception, however, occurred in the case of persons in the military service, and the same privilege was extended to advocates, who might retain whatever they earned in the exercise of their profession, even while subject to parental authority in other respects.

By an imperial ordinance, addressed by the Emperors Valentinian, Valens, and Gratian, A. D. 370, to Olybrius, the Prefect of Rome, regulations were made in regard to the number

¹ Niebuhr, Lect. History of Rome, vol. 2, 23.

of counsel who should be heard on a side ; and if any advocate was assigned by the judge to appear for a party, and declined the task on insufficient grounds, he was to be disbarred.¹

The Code Justinian frequently mentions the *advocati fisci*, who occupied the position, apparently, of government counsel, attorney-general, or queen's counsel, in our times. Their duty was to attend to all cases in which the interests of the crown were concerned, and, except in a few instances, they were not allowed to undertake private causes. Even after they retired from office, they could not, without special license from the emperor, appear against the crown. But while in or out of office, they were allowed to do so in causes where they, or members of their families, were parties.

The whole body of advocates was, in the time of Constantine, divided into two classes, called *statuti* and *supernumerarii*. The former belonged to a particular corps, and confined their practice to a particular forum, the numbers attending which were limited by law. Thus, in the Court of the Prefect of the City, at Constantinople, eighty were allowed to practice ; in Alexandria, fifty, etc. The *supernumerarii* were those who were attached to no particular bar, and supplied such vacancies as occurred among the *statuti*.

Women were not allowed to become advocates, with the exception of those whose fathers were prevented, on account of sickness or infirmity, from conducting their own suits, and who could get no one else to plead for them. But, as a general rule, those who were unable to obtain counsel to defend them, as well as those incapacitated from appearing in their own behalf, by reason of being blind or deaf, had counsel assigned them by the prætor.

When causes were once decided, they could not be reheard on the ground that the trial had proceeded in the absence of counsel ; but if it could be satisfactorily shown that an advocate had betrayed his trust, he was punished, and the cause might be heard again. But if the client failed to establish the misconduct of his counsel, he was convicted of calumny, and the previous judgment allowed to stand.

¹Cod. II, VI, 7; Forsyth, Hortensius, 188.

An edict was directed against scurrility and abuse in the conduct of a cause. Advocates were told to confine themselves to the merits of a case, and not indulge in open invective or covert sarcasm against their opponents. This restriction forms a marked contrast to the license allowed in the days of the Republic.¹

Under the early Christian emperors, priests were not allowed to exercise the functions of advocates. Justinian strictly prohibited any one in holy orders from pleading in the Courts, whether interested or not, or even where their churches or monasteries were interested or not. But afterwards the custom varied in different churches. In those of Rome and Spain the prohibition seems to have continued in force.

§ 7. Lawyers in the Middle Ages.—When, at length, the Roman Empire had declined and at last fallen, and before feudalism emerged from the Dark Ages and effected its important changes in the law of persons and of property, but few traces are to be found either of advocates or of their profession. Languages were undergoing transitions, and feuds and wars were unfavorable to the administration of law. We catch a few glimpses of the existence of advocates among the nations who overran the Roman Empire. A law among the Lombards provided that if any one, through ignorance, was unable to plead his own cause, he was to commence his suit, and if the king or judge saw that he had right on his side, he was then to appoint him a man who was to undertake his cause. Hein-eccius says that advocates were, throughout the German tribes, allowed to plead, by permission of the judge. Hachenberg adds that they were required to conduct their causes in plain and unadorned language, without circumlocution. In the Capitularies of Charlemagne they were called *clamourers*, or *clumatores*.

After the first crusade, A. D. 1099, Godfrey, Duke of Bouillon, or Boulogne, who then attained the throne of Jerusalem, caused to be compiled a code of laws for his new kingdom. These were taken from the various feudal customs and usages

¹ Forsyth, Hortensius, 191.

that prevailed in the countries of Western Europe. At the same time he established two secular courts of justice, one called *La Haute Cour*, the High Court, of which he himself, as suzerain, was the Chief Justiciary; and the other *La Cour des Bourgeois*, or Court of the Commonalty, called also the Viscount's Court, presided over by one of his feudal lords who bore that title. The judges of the High Court were the chevaliers, who held by tenure of knight's service; and the judges of the Court of Commonalty were *bourgeois* of the city or townfolk. In neither court did the presiding officer take any part in the judgment. His office was like that of the archon at Athens, and prætor at Rome. In the High Court were adjudged the causes of the great feudatories of the kingdom; and in the Court of Bourgeois, justice was administered to the commonalty.¹

The code of laws thus compiled consisted of two collections—both called assizes, one for each court—usually styled the “Assizes of Jerusalem.” They were placed in a casket, and deposited in the treasury of the Church of the Holy Sepulcher at Jerusalem, and from this were sometimes called *Lettres du Sépulcre*. The original copy was destroyed or lost upon the capture of the city by Saladin, A. D. 1187. Copies, however, probably existed, for the system remained, and a collection of them was edited by Jean d'Ibelin in the early part of the thirteenth century, under the titles of “*Assises de la Haute Cour*, *Livre de Jean d'Ibelin*,” and “*Livre des Assises de la Cour des Bourgeois*.” These collections may be called the germ of the English common law, and constitute, doubtless, the first treatise on feudal law.²

A mention of these collections is so far relevant to the present purpose in that they provide regulations for the conduct and duties of attorneys and advocates, and contain provisions for the appointment of counsel to defend persons accused of crime.

§ 8. The bar in France.—Advocates in France have, under the designation of “*Noblesse de la Robe*,” held a prominent position from very early times. From their ranks have been

¹ Forsyth, Hortensius, 182-3.

² *Ibid.* 194.

taken the magistrates, who, as members of the Parliament of Paris, represented the feudal court and council of the ancient kings; and in all times, considering the vicissitudes of the country in which they have lived, the changes of dynasties, and the despotism and oppressions of many of the rulers, they have maintained a condition of remarkable and bold independence. To them the Gallican Church owed its successful resistance to the arrogant pretensions and usurpations of the Papal See. They were for a long time the only persons qualified by education or by temper to dispute, by arguments and by writings, the claims of Rome over the possessions and souls of men. The attacks made by the advocates upon ultramontane doctrines finally spurred the secular clergy to resistance, and the consequence, for a long time, was a comparative freedom from papal bondage.

The High Court (to which the name Parliament was applied) was the supreme and capital court of justice in France. Sometimes the king himself presided, (as it is probable he did in the early times of England¹) surrounded on each side by the judges, (*conseillers*) who sat upon an elevated bench, while below was another bench reserved for the different officers of the court, and as a seat of honor for the senior advocates (*anciens avocats*). In front were the benches which were occupied by the younger advocates, attorneys, and persons interested in the cause that was going on. Malpractices on the part of the members of the court were punished with exemplary severity. In 1348, one of the judges, having falsified some depositions in a case which came before him, was hanged by order of the Parliament. And in 1496 a clerk and councillor was convicted of having made a false report regarding some matters which had been referred to him; the church made an effort to save him, but stern justice was awarded, not indeed in the same form, but in the shape of the pillory, branding on the forehead, and perpetual banishment.

From the fourteenth century the bar of France constituted an order of nobility, and was fully recognised as such. The advocates who attended the Court of Parliament were spoken

¹ Hawkins' Pleas of the Crown, book 2, chap. 1; Forsyth, 203.

of as an order,¹ a name which they retained until the Revolution of 1789. Before any one was admitted as a member, or allowed to enroll his name upon the list, or *tableau*, which was kept by the Parliament, he was formally presented by some advocate of long standing, and obliged to take an oath of advocacy, his competency being established by previous examination. After the presentation, he entered upon a noviciate of several years of study and attendance on the courts before his name was actually inscribed as an advocate.

He was subject to certain rules and prohibitions; and Mr. Forsyth has collected them, as he informs us in a note,² from a venerable work written in 1360, called "*Le Grand Coutumier Général de Pratique, Civil et Canon*," by Jean Bouteiller, *Conseiller en la Cour de Parlement*.

Among other prohibitions he gives us the following:

1. He was not to undertake just and unjust causes alike, without distinction; nor maintain such as he undertook, with trickery, fallacies, and misquotations of authorities.

2. He was not, in his arguments, to indulge in abuse of the opposite party, or his counsel.

3. He was not to compromise the interests of his clients, by absence from court when the cause in which he was retained was called.

4. He was not to violate the respect due to the court, by improper expressions, or unbecoming gestures.

5. He was not to exhibit a sordid avidity of gain, by putting too high a price upon his services.

6. He was not to make any bargain with his client for a share in the fruits of the judgment he might recover.

7. He was not to lead a dissipated life, or one contrary to the gravity and modesty of his calling.

8. He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed.

§ 9. The modern bar of France.—After the Revolution, and in 1804, Napoleon decreed the re-establishment of the or-

¹ Fournel, *Histoire du Parlement*, vol. 1, 274, 275.

² Forsyth's *Hortensius*, 215, note.

der of advocates "as one of the means most proper to maintain the probity, delicacy, disinterestedness, desire of conciliation, love of truth and justice, an enlightened zeal for the weak and the oppressed, which are the essential foundations of their profession." In 1810, he issued an imperial ordinance containing a number of rules, for the purpose of regulating "that salutary discipline of which advocates showed themselves such zealous guardians in the palmy days of the bar." Among the rights and duties thus prescribed were the following:

"We expressly forbid advocates to add their signatures to opinions, pleadings, or writings which are not their own, or which they have not duly considered. We likewise forbid them to make any bargains for their fees, or to compel their clients to recompense them before the conclusion of a case, under the penalty of a reprimand for the first offense, and expulsion from the bar, in case it is repeated.

"Advocates shall have free scope for the exercise of their office, in the defense of justice and of truth; at the same time, it is our wish that they should abstain from all inventions in their facts, and from other evil practices, as well as from all useless or superfluous speeches.

"We forbid them to indulge in any injurious or offensive personalities against parties to whom they are opposed, or their counsel; to assert any fact seriously affecting the honor or reputation of the opposite party, unless the necessity of the case requires it, and they have express written instructions to that effect from their clients, or the attorneys of the latter."

The Criminal Code of Procedure of France prescribes substantially the following form of procedure: On the day fixed for the opening of the assize court, twelve jurymen must take their seats opposite the accused. If the trial is likely to be protracted, one or two supplemental jurymen are taken, by lot, from the jury panel, who attend to the evidence, and supply the place of any juror or jurors who may not have sufficient strength to sit out the trial. The president interrogates the prisoner as to his name, age, profession, residence, and place of birth. He must then notify the counsel of the prisoner that he is to say nothing contrary to his conscience, or to the respect due to the laws, and that he ought to express himself with

decency and moderation. In the next place, he must, standing and uncovered, address the jury in the following terms: "You shall swear and promise, before God and before men, to examine with the most scrupulous attention the charges which shall be preferred against the prisoner (naming him); to betray neither the interests of the accused, nor of society, which accuses him; to communicate with no one until after you have given your verdict; to listen neither to hate, nor malice, nor fear, nor favor; to decide, after hearing the charges and the defense, according to your conscience and intimate conviction, with the impartiality and firmness which belongs to a man who is just and free." Upon this, each of the jury, being separately called on by the president, raises his hand and says: "I swear."

The officer of the court then reads the commission or decree of the *Cour Royale*, remitting the case to the assizes, and also the indictment, *acte d'accusation*. The attorney-general then opens the case against the prisoner, and gives in a list of the witnesses who are to be examined, both for the crown and for the prisoner; and their names, professions, and places of residence must be notified twenty-four hours at least, to the prisoner, before their examination on the part of the crown, and the same notice must be given to the crown on the part of the prisoner. Each witness is sworn to speak without fear or hate, and the truth, and nothing but the truth. After each deposition has been given, the president must ask the witness if it is of the prisoner at the bar that he has heard such and such a thing. The witness is not to be interrupted; but the accused or his counsel may, after he has given evidence, interrogate him through the medium of the president, and say, as well against him as his testimony, whatever may conduce to his defense. The president may question the witness and the prisoner on all points which he deems necessary to the elucidation of the facts of the case. The other judges and the attorney-general may do the same, on first obtaining permission from the president; but the prosecutor himself can put such questions only through the medium of the president. When the witnesses for the prosecution have been heard, the prisoner brings forward his own, of whom he has previously furnished a list, and who can depose either with reference to the charges mentioned in the

indictment, or to his character as a man of honor and probity ; but no witness is admissible who is related to the prisoner in either the directly ascending or descending line, nor is his brother, or sister, or wife, or husband, even after divorce, nor an informer, to whom the law assigns a reward. But the objection may always be waived by the crown or the prisoner, where the evidence is offered by the other side. When facts are deposed to, tending to convict the prisoner, it is the duty of the president to call upon him to say whether he admits their truth. When the witnesses have given their evidence, the prosecutor or his counsel and the attorney-general are to be heard in support of the indictment; and the prisoner or his counsel may then make their defense. Upon this, the prosecutor and the attorney-general may reply, but in all cases the prisoner or his counsel is to have the *last word*.

It is then the duty of the president to sum up, and he informs the jury that if a majority of them think that there exist in favor of accused, extenuating circumstances, though they find him guilty, they are to announce their verdict in the following terms: "In the opinion of the majority there are extenuating circumstances in favor of the prisoner." He also informs them that they are to give their votes by ballot, and that if the accused is found guilty by a majority of only one vote, they must state this upon the delivery of their verdict. They then retire to the jury-box, and on their return the president asks them for their verdict, upon which the foreman rises and placing his hand upon his heart, says: "Upon my honor and conscience, before God and before man, the verdict of the jury is—'Yes, the prisoner is guilty'; or, 'No, the prisoner is not guilty.'" At the same time he delivers to the president the verdict in writing, signed by himself.

In the trials in the French courts, hearsay evidence, leading questions, and self-crimination are allowed to an extent bewildering to the English or American lawyer.

§ 10. Avoués and avocats.—There are two classes of lawyers now practicing before the Courts of First Instance and of Appeal, viz: *avoués*, or attorneys, and *avocats*, or advocates. The *avocats* of the *Cour de Cassation* discharge at the same

time the functions of the *avoués*. The *avoués* of the Tribunals of the First Instance are distinct from those of the Courts of Appeal, while there is but one body of *avocats* for the two jurisdictions known as *avocats à la Cour d'Appel*.

The employment of an *avoué* is necessary, (except that in theory a party may *defend* himself, or select whom he pleases to defend him) while that of an *avocat* is purely voluntary. The former is the agent and representative of the party, the latter is not. The former directs the proceedings, furnishes or receives all communications requisite for the preparation of the case, and lays before the court the demands of his client. The latter argues the cause and gives consultations. The analogy between the English attorneys and barristers is plain—the *avoué* being the counterpart of the English attorney, and the *avocat* corresponding to the English barrister.¹

§ 11. Qualifications for admission to the bar.—In order to be admitted as an *avocat*, the candidate must have obtained the degree in law called “*licence en droit*,” for which three years’ terms or attendance on the lectures of the law school, or *Faculté de Droit*, are necessary. These lectures comprise a course of instruction in the history of law; Roman law; the law of nations; common or uncoded law; the French Civil Code and Code of Procedure; criminal, constitutional, administrative, and commercial law; and political economy. Administrative law is that whose object is to establish the relations of the executive power and its agents toward individuals, communities, and public establishments. Previously to all this, he must have obtained the degree of bachelor of letters, after passing an examination in French, Latin, and Greek composition, as well as in literature, history, and philosophy. He must also have passed three years in attendance on the courts before he can be entered on the rolls and admitted to practice.

To be received as an *avoué* the candidate must in like manner have obtained the degree of bachelor of letters, and then have followed for a year the course of criminal legislation, and of civil and criminal procedure, and have passed an examination before

¹ 11 Am. Law Rev. 679.

the professors of the law school. He must also have passed five years as a clerk in the office of an *avoué* in order to be admitted as an *avoué* of a *cour d'appel*.¹

§ 12. Appointment of attorneys.—The *avoués* are limited in number, and are appointed by the chief of the executive power upon the presentation of the *avoué* retiring in favor of the nominee, or upon that of the legal representatives of a deceased *avoué*. High prices are paid for these positions. The number of attorneys and practicing advocates is very small in proportion to the population—the total number of *avoués* and *avocats* of all the courts in Paris, in 1874, being only 904. Adding to this number 123 *notaires*, who are public functionaries invested with important privileges, but do much of the work which in the United States is done by attorneys, and there remains a total of 1,027 educated lawyers; while in the city of New York, with a population less than half that of Paris, there are over 3,500 persons practicing as attorneys and counsellors.

§ 13. Discipline and independence of the bar.—Both *avoués* and *avocats* are independent of the governing power. The *Chambre des Avoués*, at the head of which is a president, and the *Conseil de Discipline des Avocats*, presided over by the *bâtonnier*, are charged with the duty of maintaining discipline and punishing misconduct among the members of their respective orders. The punishments consist of recall to order, censure, public reprimand, expulsion from the *Chambre des Avoués*, and in the case of *avocats*, temporary suspension, or even striking from the rolls.

There is a third class of men, *hommes d'affaires*, not properly lawyers, but rather collection agents, who may, if provided with a special power, represent their clients before the tribunals of commerce, or the *juges de paix*.²

§ 14. Advocates in England.—The conduct of advocates in England, as distinguished from attorneys, was never subject to much legislative interference; but there is an ancient statute,

¹11 Am. Law. Rev. 679.

²Ibid. 681.

which was passed in 1275, in the reign of Edward I, by which it was provided that "if any sergeant, (countor) or others, do any manner of deceit or collusion in the king's court, or consent unto it, in deceit of the court, or to beguile the court, or the party, and thereof be attained, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man; and if he be no countor, he shall be imprisoned in like manner by the space of a year and a day at least; and if the trespass shall require greater punishment, it shall be at the king's pleasure." Some further regulations were laid down in the "*Miroir des Justices*," written by Andrew Horne, who is supposed to have lived in the reign of Edward II.

Previously to 1695, in criminal trials, for treason and felony, even where life was concerned, the prisoner at the bar could not have counsel in matters of fact,¹ but only when some point of law arose for discussion, proper to be debated, and this the judges were to decide beforehand, as the cases arose before them; and they often refused all the assistance prayed for by the prisoner.² The chief reason for this rule was that the court was counsel for the prisoner—but this often was rather theoretical than practical; indeed, it often happened in English history that the court was a powerful advocate against the defendant.³

It was not until 1695 that a statute was passed, after much opposition, the 7 Will. III, chap. 3, entitled "An Act for Regulating of Trials in Cases of Treason and Misprision of Treason," which provided, among other things, that any person accused and indicted, arraigned, or tried for high treason, whereby any corruption of blood may be made to any such offender or his heirs, or for misprision of such treason, "shall be received and admitted to make his full defense by counsel learned in the law; and in case any person so accused or indicted shall desire counsel, the court before whom he shall be tried, or some judge of

¹ Hawkins' *Pleas of the Crown*, book 2, chap. 39; Emlyn's *Preface to State Trials*; note to *State Trials*, 5, 466; Stephens' *Com.* 4, 425.

² Trial of Lord Russell, 9 *State Trials*, 578; Trial of Duke of Norfolk, 1 *State Trials*, 965; Trial of Col. Lilburne, 4 *State Trials*, 1329; Trial of Sir Henry Vane, 6 *State Trials*, 153; Trial of Algernon Sidney, 9 *State Trials*, 817.

³ See Trial of Alice Lisle, 11 *State Trials*, 322.

that court, shall immediately, upon his request, assign to him such and so many counsel, not exceeding two, as he shall desire, to whom such counsel shall have free access at all seasonable hours." But it was declared by section twelve that the statute should not extend to any impeachment or other proceedings in Parliament, nor to any indictment of high treason for counterfeiting the great or privy seal, or coin of the realm. .

In 1747, the provisions of the statute of William III, regarding the assignment of counsel, were extended to parliamentary impeachments in cases of high treason, and misprision of treason; but still in no trials for felony, and those cases of inferior treason which concerned the coin of the realm, and the seals, whether the offense were clergyable or not, was a prisoner allowed counsel to plead his cause to the jury. But at last, by the 6 and 7 William IV, chap. 114, it was enacted that all persons tried for felonies should be admitted, after the close of the case for the prosecution, to make full answer and defense thereto, by counsel learned in the law, or by attorneys in courts where attorneys practice as counsel.¹ The preamble announces the principle, "that it is just and reasonable that persons accused of offenses against the law should be enabled to make their full answer and defense to all that is alleged against them."

"It was," says Blackstone, "a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated."² A rule which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner—that is, shall see that the proceedings against him are legal and strictly regular)³ seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man which yet is allowed him

¹ See also 28 Vict. chap. 18.

² 2 Hawk P. C. 400.

³ Sir Edward Coke gives another additional reason for this refusal: "Because the evidence to convict a prisoner should be so manifest as it could not be contradicted"; which Lord Nottingham (when High Steward) declared (3 St. Tr. 726) was the only good reason that could be given for it.

in prosecutions for every petty trespass? Nor, indeed, is it, strictly speaking, a part of our ancient law; for the *Mirror*¹ having observed the necessity of counsel in civil suits, who know how to forward and defend the cause, by the rules of law and customs of the realm, immediately afterward subjoins, “and more necessary are they for defense upon indictments and appeals of felony than upon other venial causes.” And the judges themselves are so sensible of this defect that they never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law, arising on the trial, they are *entitled* to the assistance of counsel. But, lest this indulgence should be intercepted by superior influence in the case of state criminals, the legislature has directed, by statute, (7 William III, chap. 3) that persons *indicted* for such high treason as works a corruption of the blood, or misprision thereof, (except treason in counterfeiting the king’s coin or seals) may make their full defense by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge; and the same indulgence, by statute, (20 Geo. II, chap. 30) is extended to parliamentary *impeachments* for high treason which were excepted in the former act.”²

The prisoner was not allowed counsel to plead his cause before the jury in any felony, whether capital, or within the benefit of clergy; nor in a case of petty larceny. But in misdemeanors the prisoner or defendant was allowed counsel as in civil actions; but even here the defendant could not have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury.³

Perhaps the maxim that the judge was counsel for the prisoner signified nothing more than that the judge should take care that the prisoner did not suffer from the want of counsel. The judge was counsel only for public justice, and to promote that object all his inquiries and attention should have been directed.⁴

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¹ Chap. 3, sec. 1.

² 4 Blackst. Com. *335.

³ *Rex v. White*, 1 Ryan & M. 166; 3 Camp. 98.

⁴ Fost. 232, 242; 1 Chitt. C. L. 2d ed. 407-411.

§ 15. The inns of court.—A sketch of the English bar would be incomplete without reference to a peculiar and time-honored institution—the inns of court. These are colleges in London, in which students of law reside and pursue their studies. In England, at a very early date, the science of law was taught in the metropolis in certain buildings in the immediate vicinity of the courts of law, which were called “Inns of Court”; inn anciently signifying a mansion or place. The establishment of the Court of Common Pleas at Westminster led to the gathering in its neighborhood of the whole body of “common” lawyers, and to the establishment in the metropolis of hostels, or *hospitia curiæ*, which were so called because they were attached to or dependent upon the court. These hostels were occupied by the lawyers as offices, and sometimes as dwellings, and contained also schools, where the law was studied. But, in 1346, the Knights Hospitallers of St. John of Jerusalem, to whom had been granted the English estates of the suppressed order of Knights Templars, leased the buildings and gardens of the Templars in London to certain students of the common law, who established in them a hostel, or inn of court. The place continued to be called the “Temple,” from its former occupants. In the course of a few years the number of inns increased to four, which still exist, and each of which contained 200 members. Stow, in his “Survey of London,” (1598) says of the lawyers who occupied these inns: “These societies are no corporations, nor have any judicial power over their members, but have certain orders among themselves, which, by consent, have the force of laws. For slight offenses they are only excommunicated, that is, put out of commons, which is, not to eat with the rest in their halls; and for greater, they lose their chambers, and are expelled the house; and being once expelled, they are not to be admitted by any of the other three societies.”

The gentlemen in these societies may be divided into four ranks: (1) benchers, (2) utter benchers, (3) inner barristers, (4) students.

In course of time two bodies were formed, called the “Honorable Society of the Inner Temple,” and the “Honorable Society of the Middle Temple,” who held their buildings as tenants of the Knights Hospitallers until the suppression of monastic

bodies by Henry VIII, after which they held them of the crown by lease. In 1608, the buildings of the two temples were granted by letters-patent of James I to the Chancellor of the Exchequer, the Recorder of London, and the benchers and treasurers of the Inner and Middle Temples, for "lodging, reception, and education of the professors and students of the laws," and it is by virtue of these grants that they are still held by an incorporated society of the "students and practicers of the laws of England." In the hall of the Inner Temple, dinner is prepared for the members of the inn every day during term-time. Students of law must keep twelve terms—that is, five years—at the inns of court before they are entitled to be called to the bar; and those of the Inner Temple are required to dine in this hall at least four times in each term. On certain "grand days" the judges, the masters in chancery, and many of the leading lawyers of England dine here, together with a large assemblage of the students. Each of the inns forms an independent society, but they all agree in the observance of certain common regulations. No person can keep a term in any of them without being in the hall on three days when the grace is said after dinner. None of the societies can call a gentleman to the bar before he has been five years a member of the society, unless he is a master of arts, or a bachelor of laws of the University of Oxford, Cambridge, or Dublin. No person in trade, or in deacon's orders, and no one who has held the situation of a conveyancer's clerk, can be admitted at all; and solicitors and attorneys must have their names struck off the rolls for two years, and the articles of clerks must be expired or canceled two years, before they can be admitted. An applicant rejected by one society will not be admitted by any other. On his admission the student pays various fees, and enters into a bond for the payment of his commons, or dinners, while a student. On the expiration of his terms he addresses a petition to the benchers, at a special council; and if they approve, he waits upon them after dinner, the oaths are administered, and he is called to the bar. The dues for admission vary somewhat in the different inns. The benchers of the inns are elected from the barristers at the bar according to seniority. They govern the society, and may reject an application for ad-

mission without assigning a reason. The four great inns of court have attached to them inns of chancery. These inns are principally inhabited by attorneys.

In the time of Henry VI, the *hospitia*, or inns for the residence of professors of the law, were in the following condition: Part of Serjeant's Inn, in Chancery Lane, was inhabited by some serjeants in the time of Henry IV, when it was called Faryndon's Inn—the inheritance of it belonged to the Bishops of Ely. In the reign of Henry V, the whole house was demised to the judges and apprentices of the law, as appears by sums accounted for to the bishop. In 9 Henry VI, it obtained the name of *Hospitium Justitiariorum*. In 2 Richard III, there was a lease of it under the name of *Hospitium Vocatum Serjeant's Inn*. This demise was at £4 per annum. It appears in 21 Henry VI, that the serjeants then, if not before, held Serjeant's Inn, in Fleet Street, under a demise from the dean and chapter of York, at the rate of ten marks per annum.¹

There were ten inns of chancery in the reign of Henry VI. But they all subsequently became appendages to one or the other of the inns of court.²

The study of the common law, says Blackstone, having been banished from the English universities in the times of popish supremacy, it fell into a different channel. The civil and canon laws were substituted in its place in those seats of learning, and entirely supplanted it. A peculiar incident, however, as Blackstone terms it, contributed to the support and maintenance of the common law. This, he says, "was the fixing the Court of Common Pleas—the grand tribunal for the disputes of property—to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held before the king's capital justiciary of England, in the *aula regis*, or such of his palaces wherein his royal person resided, and removed with his household from one end of the kingdom to another. This was found to occasion great inconvenience to the suitors, to remedy which it was

¹ Dudg. Orig. 326; 2 Reeve's Hist. Eng. Law; Finlason, 659.

² Ibid.

made an article of the Great Charter of liberties, both that of King John and King Henry III, that Common Pleas should no longer follow the king's court, but be held in some certain place; in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the Palace of Westminster only. This brought together the professors of the municipal law, who before were disposed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons who, (as Spelman observes)¹ addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science, for the amusement of leisure hours, soon raised those laws to that pitch of perfection which they suddenly attained under the auspices of our English Justinian, King Edward the First.

"In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing, at various times, certain houses, (now called the inns of court and of chancery) between the city of Westminster, the place of holding the king's courts, and the city of London, for advantage of ready access to the one, and plenty of provisions in the other.² Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers, (first styled apprentices, from *apprendre*, to learn) who answered to our bachelors; as the state and degree of a serjeant, (*servientis ad legem*) did to that of doctor."³

Apprentices or barristers seem to have been first appointed by an ordinance of King Edward I, in Parliament, in the twentieth year of his reign. "The first mention which I have met with in our law-books," says Blackstone in a note, "of serjeants or countors, is in the Statute of Westminster, 1, 3 Edw. I, chap. 29, and in Horn's Mirror, chap. 1, sec. 10; chap. 2, sec. 5; chap. 3, sec. 1, in the same reign. But M. Paris, in his 'Life of John II, Abbot of St. Albans,' which he wrote in 1255, 39 Henry III, speaks of advocates at the common law, or

¹ Glossar, 334.

² Fortesc. chap. 48.

³ 1 Blackst. Com. 23.

countors, (*quos bauci narratores vulgariter appellamus*) as of an order of men well known."

"The crown," continues Blackstone, in his text, "seems to have soon taken under its protection this infant seminary of common law; and the more effectually to foster and cherish it, King Henry III, in the nineteenth year of his reign, issued out an order, directed to the mayor and sheriffs of London, commanding that no regent of any law schools *within* that city should for the future teach law therein."

The inns of court are now four in number, and are called Lincoln's Inn, Middle Temple, Inner Temple, and Gray's Inn. The first and last were named from noble families, and the others were so called from the Knights Templar, who established themselves here in the twelfth century, and called their house the New Temple. After the dissolution of that order the Temple was leased to professors of the common law, and continued to be so leased until the appropriation of the property of religious houses by the crown in the reign of Henry VIII. The inns of court are not corporations, but voluntary societies, and mandamus will not lie to compel them to admit a member to the degree of barrister.¹ There are attached to them seven inns of chancery—Clifford's, Clement's, and Lyon's belonging to the Inner Temple; New Inn to the Middle Temple; Thavies' to Lincoln's Inn; and Barnard's and Stable's to Gray's Inn. Formerly there were also Furnival's and the Strand Inns, which have ceased to exist.

Each of the inns is governed by its own benchers, who fill

¹ *Rex v. Gray's Inn*, Doug. 353; *Rex v. Lincoln's Inn*, 4 Barn. & C. 855; *Rex v. Barnard's Inn*, 5 Ad. & E. 17.

In the case of *The King v. Benchers of Lincoln's Inn*, 4 Barn. & C. 855, the Court of Queen's Bench refused a mandamus, and the judges also refused to interfere as visitors to compel the admission of a student, the privilege of calling to the bar being vested in the benchers, or governing body of each of the four inns of court; but with respect to the call to the bar Mr. Justice Littledale said that "a member who has been suffered to incur expense with a view to being called to the bar, thereby acquires an inchoate right to be called, and if the benchers refuse to call him they ought to assign a reason for so doing; and if there be no reason, or an insufficient one, then the member who has acquired such inchoate right is entitled to have that right perfected." But all persons have not such an inchoate right. They must be approved of by the authorities. The benchers claim, and sometimes exercise, the power to disbar members after they have been called to the degree of barrister at law.

all vacancies in their order, usually from the queen's counsel, though any barrister is eligible. The benchers of each inn exercise the power of calling to the bar the members of their own inn, and also of disbarring any they have called whenever they see sufficient reason. All advocates reach the bar through one of these inns. To "keep a term" in any of them, one must dine in the common hall at least three times. The inns of chancery are only used as chambers.¹

Doctors' Commons is the college of the civilians in London, and takes its name from the fact that the doctors of the civil law practicing in London diet and lodge there in a collegiate manner, and "common" together.

§ 16. Regulations of the inns of court as to legal education.—For a considerable time, systematic education and instruction in the inns of court were discontinued. A curriculum of legal education is now, however, established by general regulations, and a synopsis of it given by Messrs. Broom & Hadley is as follows:² The entire system of education includes the subjects of: 1. The admission of students. 2. The mode of keeping terms. 3. The calling of students to the bar. 4. The granting of certificates to practice under the bar. 5. The lectures and examinations.

§ 17. Admission of students.—Every person not otherwise disqualified, who has passed a public examination at any of the universities within the British dominions, may be admitted as a student at any inn of court for the purpose of being called to the bar, or of practicing under the bar, without passing any preliminary examination. But every other person so applying to be admitted is required before admission to pass an examination in the following subjects, viz: (1) The English language, (2) the Latin language, and (3) English history. The benchers of any inn have power, however, to relax or dispense with this regulation, in whole or in part, in any case in which

¹ Blackst. Com. *23, Cooley's note; Dugdale's *Origines Juridicales*; Herbert's *Antiquities of the Inns of Court and of Chancery*; Pearce's *Hist. of the Inns of Court*; Ireland's *Inns of Court*.

² Broom & Hadley's *Commentary*, *21, vol. 2.

they may think that special circumstances justify a departure from it. The examination, when held, is conducted by a joint board appointed by the inns of court. No attorney at law, solicitor, writer to the signet, or writer of the Scotch courts, proctor, notary public, clerk in chancery, parliamentary agent, or agent in any court, original or appellate, clerk to any justice of the peace, or person acting in any of these capacities, and no clerk of or to any barrister, conveyancer, special pleader, equity draftsman, attorney, solicitor, writer to the signet, or writer of the Scotch courts, proctor, notary public, parliamentary agent, or agent in any court, original or appellate, clerk in chancery, clerk of the peace, clerk to any justice of the peace, or of or to any officer in any court of law or equity, or person acting in the capacity of any such clerk, is admissible as a student at any inn of court for the purpose of being called to the bar, or of practicing under the bar, until such person shall have entirely and *bona fide* ceased to act or practice in any of the capacities above named or described; and if on the rolls of any court, shall have taken his name off the rolls of such court

§ 18. Keeping terms.—Students of the inns of court, being at the same time members of any of the Universities of Oxford, Cambridge, Dublin, London, Durham, the Queen's University in Ireland, St. Andrew's, Aberdeen, Glasgow, or Edinburgh, can keep terms by dining in the halls of their respective societies any three days in each term; and students, who are not at the same time members of any of the said universities, may do so by dining in the halls of their respective societies any six days in each term. But no day's attendance in hall will be available for the purpose of keeping term unless the student attending shall have been present at the grace before dinner, during the whole of dinner, and until the concluding grace shall have been said.

§ 19. Calling to the bar.—Every student must have attained the age of twenty-one years before being called to the bar, and must have kept twelve terms before being so called, unless any term or terms shall have been dispensed with as here-

inafter mentioned. Not more than four terms, under any circumstances, can be dispensed with in favor of students coming from India or the colonies, with a view to return to residence there; and it is deemed not expedient to dispense with any terms for such students, except on the following conditions, viz: Students from India must satisfactorily pass an examination in Hindoo and Mohammedan law, the Indian Penal Code, the Code of Civil Procedure, the Intestate and Testamentary Act, and in such other codes or acts as may from time to time become law in British India; and in addition to such examination, do pass such examinations and abide by all such rules and regulations as are now in force for students seeking a pass certificate by examination for call to the bar. Students from the colonies must pass such an examination as is required, and abide by all such rules and regulations as are now in force, in order to obtain a certificate of honor. But each inn of court may, under very especial circumstances, dispense with these conditions.

No student is eligible to be called to the bar who has not attended during one whole year the lectures and private classes of two of the readers, unless he has been a pupil during one whole year, or periods equal to one whole year, in the chambers of some barrister, certified special pleader, conveyancer or draftsman in equity, or two or more of such persons; or has satisfactorily passed a general examination. Calls to the bar take place during term, and on the same day by the several societies.

§ 20. Certificates to practice under the bar.—No student of any inn of court is allowed to apply for or take out any certificate to practice, either directly or indirectly, as a special pleader, or conveyancer, or draftsman in equity, without the special permission of the benchers of the society of which he is a student, and no such permission will be granted until the student applying has kept twelve terms. Such permission is granted for one year only from the date thereof, but may be renewed annually. No student can obtain any such certificate unless he shall have attended such lectures and classes, or passed such an examination, or been such pupil, as would be necessary to entitle him to be called to the bar.

§ 21. Lectures and examinations.—These are under the special superintendence of “The Council of Legal Education,” consisting of eight benchers, of whom two are nominated by each of the inns of court, and of whom four are a quorum. The council has power to grant dispensations to students who may have been prevented by any reasonable cause from complying with the regulations as to attendance at lectures and classes; and all arrangements touching the number of public lectures to be delivered by the readers, and the hours and extent of private classes, are with the council. For the purposes of education the legal year is considered as divided into three terms: one commencing on the 1st of November, and ending on the 22d of December; the second commencing on the 11th of January, and ending on the 30th of March; and the third commencing on the 15th of April, and ending on the 31st of July, subject to a deduction of the days intervening between the end of Easter and the beginning of Trinity term.

For the purpose of affording to the students the means of obtaining instruction and guidance in their legal studies, six readers are appointed: 1. A reader on jurisprudence and civil and international law. 2. A reader on the law of real property. 3. A reader on the common law, who also must give instruction on the subject of the office and duties of magistrates. 4. A reader on equity. 5. A reader on constitutional law and legal history. 6. A reader on Hindoo and Mohammedan law, and on the laws in force in British India.

The duties of these readers principally consist in the delivery of lectures in each educational term; of the formation of classes of students, for the purpose of giving instruction in a more detailed and personal form than can be supplied by general lectures; and of affording to students generally advice and directions for the conduct of their professional studies. Two courses of lectures are delivered by the reader on common law, the reader on equity, and the reader on real property in each educational term, of which one is on the elementary and the other on the more advanced portion of the subject to which his lectures apply. The readers assist in conducting the general examinations held twice a year for the examination of all such students as may be desirous of being examined previously to being called

to the bar. As an inducement to students to prepare themselves for such examinations, studentships and exhibitions have been founded of fifty guineas per annum each, and twenty-five guineas per annum each respectively, to continue for a period of three years. One such studentship is conferred on the most distinguished student at each general examination, and one such exhibition is conferred on the student who obtains the second position; and, further, the examiners select and certify the names of three other students who have passed the next best examinations, and the inns of court to which such students as aforesaid belong may, if desired, dispense with any terms, not exceeding two, that may remain to be kept by such students previously to their being called to the bar. Pass certificates for a call to the bar are also awarded at these examinations; the examiners, however, are not obliged to confer or grant any studentship, exhibition, or certificate unless they are of opinion that the examination of the students has been such as entitles them thereto. At every call to the bar those students who have passed a general examination, and either obtained at such examination a studentship, an exhibition, or a certificate of honor, take rank in seniority over all other students who may be called on the same day. The examination is by printed and oral questions on books and subjects specified in a programme previously issued.

Besides the above general examinations, there are, in the month of July in each year, voluntary examinations of the students upon the subjects of the several courses of lectures; but no student is entitled to go in for examination on any of such subjects unless he has obtained a certificate from the reader that he has duly attended his lectures and classes upon the subject on which he offers himself for examination. These voluntary examinations are conducted by barristers (not being readers) nominated for that purpose by the Council of Legal Education.

It is ordered that no student who shall be entitled to a certificate of having attended the advanced course of lectures of the reader on common law, on equity, or on the law of real property, shall be at liberty to go in for examination upon the subject of the elementary course of lectures on the same head; and that no student shall be admitted for examination on the subject

of the elementary course of lectures on any of the above-mentioned heads after he shall have kept more than eight terms, or for examination on any of the subjects after he shall have kept all his terms, unless in either case the Council of Legal Education for special reasons think fit to allow the same.

As an inducement to students to attend and make themselves proficient in the subjects of the lectures, exhibitions have been founded, and are conferred on the most distinguished students at the voluntary examinations. Five such exhibitions are given to members of the advanced classes in the common law, in the law of real property, and in equity, and the most proficient among the students in jurisprudence, the civil law, and international law, and the students in constitutional law and legal history every year; they are of the value of thirty guineas a year each, and endure for two years. Three of such exhibitions are given to members of the elementary classes in the common law, in the law of real property, and in equity, and are twenty guineas a year each, and endure for two years, but merge on the acquisition of a superior studentship.¹

§ 22. Lawyers in Scotland are known as writers, solicitors, and advocates. The last named are admitted by the Faculty of Advocates, and may practice in all the courts and in the House of Lords. Writers to the signet are a class of attorneys having some special privileges.

§ 23. The profession in the United States.—In the United States each State has its own rules regarding the legal profession; but certain remarks are of general application.

No person is at liberty to hold himself out as a practitioner of the law without being duly licensed as such by some proper court. A license granted by the highest court of the State gives authority to practice in all the courts of that State. In some States inferior courts are permitted to grant licenses of like effect; but generally their jurisdiction in this regard is limited to granting admissions to practice in their own courts. In most of the States any one may manage his own case in per-

¹ 1 Broom & Hadley's Commentaries, *21; 1 Cooley's Blackstone, *24.

son, and in some he may, by special deputation, empower any one, whether admitted to the bar or not, to act for him. The English designations of attorney, solicitor, proctor, and counsellor are nominally retained, but with no corresponding division of privileges and duties between the counsellor and the others; and if in any of the States any distinction exists between an attorney and a counsellor, the latter is only an attorney who becomes counsellor, or entitled to admission as such, by virtue of his practice for a certain period of time. In most of the States, to entitle one to apply for admission to the higher courts, he must present certificates showing that he has pursued the study of the law for a prescribed period in the office of a practicing attorney or in a law school; and he is then examined as to his legal attainments, either in open court or by a committee of the bar, or both, and only admitted if the examination proves satisfactory. In some States, applicants are entitled to examination for admission without making any showing as regards previous studies. Practitioners in the highest courts of the several States are admitted to practice in the Federal courts on motion, without examination. In courts not of record, license to practice is not usually required.

§ 24. Legal instruction in the United States.—Until recently, instruction in the law in the United States has been given for the most part in the offices of practicing lawyers. The Litchfield Law School was established in 1784, and was continued about fifty years, attaining much celebrity. Mr. (afterward Judge) Reeve, of Connecticut, was at first the sole instructor, but Judge Gould was afterward associated with him, and under them many leading lawyers and statesmen of the country received their legal training. The Harvard Law School was next in point of time, being established in 1817. Law schools are now numerous, and the proportion of students in the law who receive instruction in them continually increases. Most of them confer the degree of Bachelor of Laws, which, however, is not necessarily an admission to the bar. The rules of admission are different in the different States, and are established either by statute or by rule of court. In some of the

States, a diploma from the law school entitles the student to admission on motion, without examination.¹

§ 25. Difference between the English and American bar.—When England sent out her colonies, the bar, like most other institutions, reappeared upon the new soil, and held a similar position to the one it held at home ; it existed because the conditions of a progressive society required its existence. The lawyers in America soon acquired professional habits, and an *esprit de corps* similar to that of their English brethren, and fifty years ago enjoyed a power and social position even greater than the bar held in England.

In the United States, there is no distinction between barristers and attorneys. Every lawyer, or “counsel,” is permitted to take every kind of business: he may generally argue a case in the highest courts, or write letters to delinquent debtors ; he may himself conduct all the proceedings in a cause, confer with the client, issue the writ, draw the declaration or complaint, get together the evidence, prepare the brief, and manage the trial when it comes on in court ; he is not necessarily employed by, nor must he deal exclusively with, another professional man, as barristers do, but with the client himself, who generally seeks him out and makes his bargain with him directly.

All a lawyer’s functions *may*, therefore, be joined in one person ; still, considerations of practical convenience have, and do establish at times a division of labor somewhat similar to the English system. Partnerships are formed in which one member undertakes the court work, and the duties of the advocate, while another, or others, transact the rest of the business, see the clients, conduct correspondence, hunt up evidence, prepare witnesses for examination, and manage those numerous matters for which, in England, a man goes to his attorney, or “solicitor” as they are now called. This plan saves the senior member from drudgery, and from being distracted by petty details ; it introduces the juniors to business, it secures to the client a closer attention to details than a leading counsel could or would

¹ 1 Blackst. Com. 24, Cooley’s note.

give, while the whole suit is managed in the same office, and the responsibility not divided, as in England, between two different persons. These are some of the advantages in favor of the system in the United States.¹ There is, also, in some States a tendency for different kinds of work to fall into different hands. As the practitioner rises it becomes easier for him to select his business, and when he has attained eminence he may confine himself to the higher walks, or to particular branches of his profession. His services may then be sought not only by the client, but by another counsel, or firm of counsel, who have suits of importance on hand. He is, however, often retained directly by the client, and then he is allowed to have a junior to aid him, or may desire his client to retain one, and he is allowed to select the person he desires—a thing that the English barrister cannot do. One conspicuous merit of the American system is, that it affords a far better prospect of speedy employment, and an active professional life, than the beginner who is not “backed” can look forward to in England. He need not always occupy a subordinate rank in the profession if his abilities qualify him for its higher walks. A further practical benefit is the absence of certain restrictions and rules, theoretically, at least, in vogue among the English lawyers. It is considered improper, in many localities, for a lawyer to advertise himself in the newspapers; this is a custom followed even in Canada. Again, counsel are allowed to make whatever bargains they please with clients—they may work for nothing, or may generally stipulate for a commission on the result of the suit, or even for a certain share in whatever the verdict promises. This, however, is not universally the case. Counsel can bring actions for the recovery of their fees, and, *pari ratione*, can be sued for negligence in the conduct of a cause.

There are two classes of persons in England who complain of present arrangements—a section of the solicitors, who are debarred from the exercise of advocacy; and a portion of the junior bar, whose members, depending entirely upon the patronage of the solicitors, find themselves, if they happen to have no private connections among that branch of the profession, absolutely

¹ James Bryce, in *Macmillan's Magazine*, 1872.

unable to get employment. They are forbidden to undertake certain kinds of work, or to do work except on a fixed scale of fees, or to take work directly from a client, or to form partnerships with other counsel.

Rules regulating the conduct of the profession may be viewed as they affect either the profession, the client, or the nation and community at large. So far as the advantage to the profession is concerned, it would seem that the balance of advantage is in favor of the American system of uniting barristers and attorneys in one body. The attorney has a wider field, greater opportunities of distinguishing himself, and the satisfaction of seeing the cause in all its stages. The junior finds it easier to succeed, even as an advocate, and if advocacy is not that for which he is particularly fitted, he may adopt the functions of a solicitor. The senior, or leader, may suffer some. He is more distracted by various calls, he does more petty work, he finds it less easy to devote himself to a special department of law, he has the responsibility of the entire conduct of the case, which in England is divided between counsel and attorney, so that neither can charge a miscarriage on the other. The gain to the client is still clearer, as it must be admitted that he is more expeditiously and effectively served where he has but one person to look to and deal with throughout. Mistakes and oversights are less likely to occur, since the advocate knows the facts better, and generally sees and questions the witnesses before going into court. The benefit to the nation, or to the community, is not so apparent. The most important part of the profession, politically considered, is that part which corresponds to the English barristers. It is that part which is in direct contact with the judges, which conducts the causes in the courts, which cultivates oratory, which influences assemblies and public meetings outside of professional duty. In England, this small body can be kept under strict control, it can cherish a strong professional feeling, and may with safety be allowed some exceptional privileges. But when the mass of the whole profession is entitled to these privileges, it is not possible to maintain the same supervision, nor perhaps is the scientific character of the law as well promoted as by a section of the profession not distracted by an attorney's office work. The relation between the advocate and

the judge is more independent than where the fee depends on success, or a share or commission is given to the advocate. A judge's corruption is less likely to be taken advantage of, and the advocate is less likely to make an attempt to undermine the honor of the judge.¹

¹ See article by James Bryce, in *Macmillan's Magazine*, 1872.

CHAPTER I.

DEFINITIONS AND CLASSIFICATIONS—USE OF TERMS.

- § 26. Different designations applied to lawyers.
- § 27. Advocates—Civil law, ancient and modern.
- § 28. Attorneys at law.
- § 29. Barristers.
- § 30. Counsel.
- § 31. Lawyers.
- § 32. Proctors.
- § 33. Sergeants at law.
- § 34. Solicitors.
- § 35. Use of terms.

§ 26. Different designations applied to lawyers.—In various countries, and in different periods, the members of the legal profession have been designated by different titles, sometimes descriptive of their respective rank and dignity, sometimes applied because of the different courts in which they have practiced, or the different branches of the profession which they have pursued. The terms in most general use have been advocates, attorneys at law, barristers, counsel and counselors, lawyers, proctors, sergeants at law, and solicitors. It becomes necessary at the outset to mention the leading distinctions between these different classes, to point out to some extent their varying functions, and to describe briefly their origin. It will then be necessary to select some generic term or terms, which, in attempting to state the law governing the entire profession, can be used in the following chapters of the book as including all classes now known to the profession, and which will be understood henceforth to comprehend them all unless there is something in the text to denote that the term is used in a more limited or in a special or local sense. Occasionally, in the future pages of the volume, it will be necessary to state separately the law in different countries, an attorney in England, for instance, being a very different person from an attorney in America, holding a very different rank, and restricted to much more lim-

ited functions. But, in so far as it is possible, the law will be stated generally as applying to all classes, whenever such be the case.

§ 27. Advocate.—The term “advocate” is derived from the Latin *advocatus*, which term denoted in the old Roman law one who, in a lawsuit, was called upon for advice by a party, and appeared with him in court, yet without pleading for him, which the *patronus* did. The term signified a legal assistant, a legal adviser; or counsel. Its general signification was an assistant, a helper, or a friend.¹ The word *advocati* afterward included patrons, pleaders, and speakers.

In the modern civil law, also, the term seems to have been extended to those who argue the causes of their clients, and to comprehend the functions of the ancient *patronus*; and in this sense an *advocate* has been defined to be “an officer of the court learned in the law, who is engaged by a suitor to maintain or defend his cause.” Advocates, like counsellors, have the exclusive privilege, in the civil and ecclesiastical law, of addressing the court either orally or in written pleadings; and in general, in regard to duties, liabilities, and privileges, the same rules apply to advocates as to counsellors.²

Originally, the management of suits of law was undertaken by the *patronus* for his *cliens* as a matter of duty arising out of their reciprocal relation. Afterward it became a profession, and the relation, though a peculiarly confidential one while it lasted, was but temporary, ending with the suit. The profession was governed by very stringent rules. A limited number only were enrolled, and allowed to practice in the higher courts; one hundred and fifty before the *præfectus prætorio*,³ fifty before the *præfectus Augustus*, and *dux Ægypticus*, at Alexandria.⁴ The enrolled advocates were called *advocati* or *dinarii*. Those not enrolled were called *advocati supernumerarii* or *extraordinarii*, and were allowed to practice in the inferior courts. From their ranks vacancies in the list of *ordinarii* were filled; the latter

¹ Cic. pro Cæc. chap. 8; Livy, lib. 2, 55; Ibid. 3, 47; Inst. 1, 2; Dig. 50, 13.

² Bouv. Dic. ad verb.

³ Dig. 8, 11; Code, 2, 7.

⁴ Dig. 8, 13.

were either *fiscales*, who were appointed by the crown for the management of suits in which the imperial treasury was concerned, and who received a salary from the State, or *privati*, whose business was confined to private causes.

The *ordinarii* were bound to lend their aid to every one applying to them, unless a just ground existed for their refusal, and they could be compelled to undertake the cause of a needy party. The *supernumerarii* were not thus obliged; but, having once undertaken a cause, were bound to prosecute or defend it with diligence and fidelity. The client was to be defended against every person, even the emperor, though the *fiscales* could not undertake a cause against the *fiscus* without a special permission, unless such cause was their own, or that of their parents, children, or ward.¹ An advocate was required to be at least seventeen years of age; he must not be either blind or deaf; he was to be of good repute, not convicted of any infamous act. He could not be advocate and judge in the same cause, nor judge in a suit in which he had been engaged as advocate; nor, after being appointed judge, could he practice as advocate even in another court, nor could he be a witness in the cause in which he was acting as advocate.²

The Roman advocate (after the Code) was bound to bestow the utmost care and attention upon the cause. He was liable for damages caused in any way by his fault; he was to clearly and correctly explain the law to his clients, and honestly warn them against transgression or neglect thereof; he must frankly inform them of the lawfulness or unlawfulness of their cause of action, and be careful not to undertake a cause clearly unjust, or let himself be used as an instrument of chicanery, malice, or other unlawful action. In pleading, he was required to abstain from invectives against the judge, the opposite party, or his advocate. Conscientious honesty forbade his betraying secrets confided to him by his client, or making any improper use of them. He was to observe inviolable secrecy in respect to them, nor could he be compelled as a witness to divulge them. If he violated these obligations, he was liable not only for damages,

¹ Code 2, 6; Ibid. 2, 9; Ibid. 11; Dig. 3, 1

² Dig. 2, 1; Ibid. 3, 1; Code, 2, 6; Ibid. 1, 51; Dig. 22, 5; 22 Glück, Pand. p. 161.

but also to fine, imprisonment, suspension, or entire removal from practice, or to still severer punishment where he had been guilty of a betrayal of his trust for the benefit of the opposite party.¹

Compensation. — By the Cincian law, A. U. C. 549, advocates were prohibited from receiving compensation for their services. In course of time this became obsolete. Claudius allowed it, and fixed ten thousand sesterces as the maximum fee. Trajan prohibited this fee, called *honorarium*, from being paid before the termination of the action. This, too, was disregarded, and prepayment had become lawful in the time of Justinian. The fee was regulated by law, unless the advocate had made a special agreement with his client, when the agreement fixed the amount. Contingent fees were, however, prohibited under penalty of the advocate's forfeiting his privilege of practicing. A conditional fee, in addition to the lawful charge, and depending upon his gaining the cause, was also prohibited. But an agreement not made until after the conclusion of the suit might be entered into. The attorney might also receive an annual salary.

The advocate had the right to retain papers and instruments of his client until payment of his fee. Should this fail, he could apply for redress to the court where the cause was tried, by petition, a formal action being unnecessary.²

Under the English system the word "advocate" is virtually synonymous with the words "counsellor," or "barrister." These all come to the bar through the inns of court.

In many of the continental states of Europe, as for the most part in the United States of America, the profession of the advocate is found united with the office of attorney, solicitor, and proctor. In England, as we shall see, they are kept distinct.³ There a member of the bar, or barrister, cannot either be admitted an attorney, or serve as a clerk or pupil to an attorney, unless he is formally and voluntarily disbarred, and this even though it was wholly from inadvertence that the applica-

¹ See Code, 3, 1; Ibid. 2, 6; Dig. 22, 5; Bouv. Dic. ad verb. Adv.; 5 Glück, Pand. 110, 111; Boehmer Cons. et Decis. tit. 2, p. 1.

² 5 Glück, Pand. 122, 117, 120; Dig. 50, 13; Code, 2, 6; Dig. 3, 2.

³ See *Smith v. Andrews*, 1 Roll. Abr. 54; *Hanley v. Boswell*, Ibid. 55; *Box v. Barnaby*, Hob. 117; *Hardwicke v. Chandler*, 2 Strange, 1138; *Ex parte Bateman*, 6 Q. B. 853; 2 Dowl. & L. 725; 14 Law J. N. S. Q. B. 89; 9 Jur. 132.

tion to be disbarred was not made prior to the articles of clerkship being entered into; nor can a party, after being duly admitted an attorney, and subsequently called to the bar, be readmitted an attorney unless he be first formally and voluntarily disbarred.¹

§ 28. Attorney at law.—"An attorney," says Coke, "is one that is set in the turn, stead, or place of another," being apparently so called from the old French word *attournée*, or substitute.² The term in this sense includes any substitute or agent who is appointed to act for another.³ An attorney in fact is a private or special attorney, appointed for some particular or definite purpose not connected with a proceeding at law, the formal authority by which he is appointed being called a letter, or power of attorney,⁴ in which is expressed the particular act or acts for which he is appointed. Such a document was called in the civil law a *procuratio*, and the party appointed, the *procurator*.⁵ The term "attorney," when used by itself, is generally used as relating to an attorney at law, formally appointed or retained in an action or suit in court, answering in many respects to the *responsalis* in real actions at common law, or the *procurator ad litem* of the civilians, the main distinction being that these were only appointed subsequent to the formal contestation of the suit, when the parties themselves had already appeared in person in the court.⁶

The Roman *pragmatici* appear to have been somewhat similar in their position to the English attorney, and the *procuratores* to have answered to the English barrister. The former are described as persons who assisted the advocates when they were pleading, and helped them about points of law.⁷ This, Cicero says, they sometimes did for very trifling fees; yet he

¹ *Ex parte Bateman*, 2 Dowl. & L. 725; *Ex parte Warner*, 7 Jur. 1016.

² Co. Litt. 51b.

³ Com. Dig. Attorney A.

⁴ Story on Agency, chap. 3, sec. 25; Co. Litt. 51b, 52b.

⁵ Hein. ad Pandect, lib. 3, tit. 3, ss. 415, 423; 1 Domat, lib. 1, tit. 15, s. 1, art. 1.

⁶ Glanville, lib. 2, chap. 1; 3 Blackst. Com. 25; Paley on Pr. & Agent, 20; Hein. Antiq. lib. 4, tit. 10, sec. 2; Becher's Case, 8 Co. 58b.

⁷ *Instruebant que causas quas oratores pronunciarant, tela subministrabant, quæ ab oratores torquerentur.* Proust. n. Cic. de Orat. lib. 1-45.

at times speaks of them as skilled in legal affairs, (*in casuibus juris peritos*) and as assisting the Greek advocates, whom he designates as far inferior to the Roman.¹ It appears that they occasionally addressed the court as advocates.

Blackstone describes an attorney at law as answering to the procurator or proctor of the civilians and canonists, and one who is put in the place, stead, or turn of another, to manage his matters of law.² But according to Cicero, as we have seen, the *procuratores* seem to have occupied the superior rank, and the *pragmatici* were the Roman attorneys proper, according to the English classification.

In every court, says Blackstone, there must be at least three constituent parts—the *actor*, *reus*, and *judex*. He then defines each, and adds: “It is also usual in the superior courts to have attorneys, and advocates or counsel, as assistants.”

“An attorney at law answers to the *procurator*, or proctor of the civilians and canonists; and he is one who is put in the place, stead, or *turn* of another, to manage his matters of law. Formerly, every suitor was obliged to appear in person, to prosecute or defend his suits, (according to the old Gothic constitution) unless by special license under the king’s letters of patent.”

“And,” proceeds Blackstone, “an idiot cannot to this day appear by attorney, but in person; for he hath not discretion to enable him to appoint a proper substitute; and upon his being brought before the court in so defenseless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest.”³

“But as in the Roman law, so with us, upon the same principles of convenience, it is now permitted in general, by divers ancient statutes, whereof the first is Statute Westminster 3, chap. 10, that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the Superior Courts

¹ Cic. de Orat. lib 1, 59; Cic. Attic. 2, 20; Ibid. 4, 15; Cic. pro Cœcin, 20; Com. Dig. Bac. Abr. Attorney.

² 3 Blackst. Com. 25.

³ Inst. 4, tit. 10.

of Westminster Hall, and are in all points officers of the respective courts of which they are admitted; and as they have many privileges on account of their attendance there, so they are particularly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court—an attorney of the Court of King's Bench cannot practice in the Court of Common Pleas, nor *vice versa*. To practice in the Court of Chancery it is also necessary to be admitted as a solicitor therein."

An attorney at law is "an officer of a court of record legally qualified to prosecute and defend actions in courts of law on the retainer of clients." Other transactions, about which an attorney at law is often employed, may be performed by educated and skilled persons, who are nevertheless not *attorneys at law*.

Attorneys have been said to be either public or private—the former being an attorney at law, and a person who may be employed generally by any one to prosecute and defend actions in courts of law; the latter, attorneys in fact.¹

The ordinary business of attorneys and solicitors under the English system has extended to the conduct of formal proceedings in civil and criminal cases, to attending the courts, judges, and public officers, investigating the matters in controversy by personal communication with the clients, collecting and analyzing the evidence, summoning the witnesses, preparing for the trial or hearing, and taking the necessary proceedings after judgment.²

In modern times the duty of the attorney (using the term in its special sense) is to draft legal documents, institute suits, bring them to an issue by proper pleadings, and prepare the cases for trial.

¹ "Attorney," says Sir Edward Coke, "is an ancient English word, and signifieth one that is set in the turn, stead, or place of another. The warrant of the attorney at law is *ponit loco suo talem attornatum suum*, which setteth in his turn or place such a man to be his attorney." (Jac. Law Dic. tit. Atty.; Co. Litt. 513; 3 Blackst. Com. *25).

² *Hopkinson v. Smith*, 7 Moore, 237; 1 Bing. 13; *Reece v. Rigby*, 4 Barn. & Ald. 202; *Lee v. Ayrton, Peake*, 119; *Russell v. Palmer*, 2 Wils. 325; 4 Burr. 2061.

Besides these things, it has come within the province of attorneys and solicitors of modern times to draw and prepare agreements, wills, deeds, settlements, securities, and documents ; to conduct negotiations, procure and solicit loans, superintend the management of and the letting, purchasing, and selling of property ; to collect and receive rents and debts, invest moneys, find securities, investigate titles to property, make arrangements between debtors and creditors ; thus acting generally in the character of procurators, negotiators, conveyancers, confidential advisers, agents, stewards, receivers, and collectors.¹

§ 29. A barrister is, under the English system, a counsellor or advocate admitted to plead at the bar. He cannot be an attorney, nor can an attorney be a barrister at one and the same time. The barrister is a “counsel” or advocate, in the modern sense. He can argue the cause of the client in court, which the English attorney cannot.

As early as the reign of Edward I, the term was employed to denote counsel below the state and degree of serjeant at law, one degree corresponding to that of bachelor and the other to that of doctor in the universities. The barrister must go to the bar through the inns of court.² Coke says that this degree was anciently preferred to that of serjeant. They were termed *apprenticii ad legem*, or *ad barras*, whence the term “barrister.”³ The province of the barrister, like that of the counsel or advocate, is to give counsel in legal matters, and take charge as advocates of the causes which the attorneys have prepared for trial. The barrister is regarded in England as the superior

¹ *Hutchinson v. Gascoigne*, Holt. N. P. 507; *Adams v. Malkin*, 3 Camp. 540; *Hamson v. Harrison*, 2 Esp. 555; *Luxmore v. Lethbridge*, 5 Barn. & Ald. 898; 2 Price, 280; *Newcastle v. Kindersley*, 8 Ves. 363; *Edgar v. Hunter*, Holt. 528; *Harvey v. Mount*, 8 Beav. 439; *Rex v. Gilham*, 6 T. R. 265; 12 Anne St. 2, chap. 16, sec. 2; *Joliffe v. Hector*, 12 Sim. 308; *White v. Lady Lincoln*, 8 Ves. 363; *Sugden Vend. & Purch.* p. 6, 11th ed.; *Yates v. Freckleton*, 2 Doug. 623; *Willet v. Chambers*, Cowp. 814; *Cartnall v. How*, 4 Barn. & C. 345; *Blair v. Bromley*, 16 Law J. N. S. 185; 52 Geo. III, chap. 28; *Craig v. Watson*, 8 Beav. 427; *Whitehead v. Greetham*, 2 Bing. 464; *Green v. Dixon*, 1 Jur. 137; *Howell v. Young*, 5 Barn. & C. 259; *Hayne v. Rhodes*, 8 Q. B. 342; *Crowder v. Davis*, 3 Younge & J. 433; *Weeks v. Argent*, 16 Law J. Ex. 209; *Walsh v. Trevannion*, 16 Law J. N. S. Ch. 330; *Taylor v. Blacklow*, 3 Bing. (N. C.) 235; 3 Scott, 614; 2 Hodges, 224.

² For a full description of this process, see Introduction, *ante*.

³ *Pearce's Hist. of the Inns of Court*, 28; 2 Inst. 214.

class in dignity and importance, as between barristers and attorneys.

“Of advocates,” says Blackstone,¹ “or, as we generally call them, counsel, there are two species, or degrees—barristers and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court;² and are in our old books styled apprentices, (*apprenticii ad legem*) being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years’ standing, at which time, according to Fortescue,³ they might be called to the state and degree of serjeants, or *servientes ad legem*. How ancient and honorable this state and degree is, with the form, splendor, and profits attending it, hath been so fully displayed by many learned writers,⁴ that it need not be here enlarged on. I shall only observe that serjeants at law are bound by a solemn oath⁵ to do their duty to their clients; and that by custom⁶ the judges of the courts of Westminster are always admitted into this venerable order before they are advanced to the bench; the original of which was probably to qualify the *puisne* barons of the exchequer to become justices of assize, according to the exigence of the Statute of 14 Edward III, chap. 16. From both these degrees some are usually selected to be his majesty’s counsel, learned in the law, the two principal of whom are called his attorney and solicitor-general. The first king’s counsel under the degree of serjeant was Sir Francis Bacon, who was made so *honoris causa*, without either patent or fee,⁷ so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles II.⁸ These king’s counsel answer in some measure to the advocates of the revenue (*advocati fisci*) among the Romans,

¹ 3 Blackst. Com. 26.

² 1 Blackst. Introd. sec. 1.

³ De LL. chap. 50; Mr. Serjeant Manning’s *Serviens ad Legem*.

⁴ Fortesc. Ibid; 10 Rep. pref. Dugd. Orig. Jurid; Tract of Sergeant Wynne, 1765, entitled “Observations Touching the Antiquity and Dignity of the Degree of Sergeant at Law.”

⁵ 2 Inst. 214.

⁶ Fortesc. chap. 50.

⁷ See his Letters, 256.

⁸ See his Life, by Roger North, 37.

for they must not be employed in any cause against the crown without special license.¹ In this restriction they agree with the advocates of the fisc,² but in the imperial law the restriction was carried still further, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject.³ A custom has of late years prevailed of granting letters-patent of precedence to such barristers as the crown thinks proper to honor with that mark of distinction, whereby they are entitled to such rank and pre-audience⁴ as are assigned in their respective patents; sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general)⁵ rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers, indiscriminately, (except in the Court of Common Pleas, where only serjeants are admitted) may take upon them the protection and defense of any suitors, whether plaintiff or defendant, who are, therefore, called their *clients*, like the dependants upon the ancient Roman orators. Those, indeed, practiced gratis for honor merely, or at most for the sake of gaining influence; and so likewise it is established with us,⁶ that a counsel can maintain

¹ Hence none of the king's counsel can publicly plead in court for a prisoner, or a defendant in a criminal prosecution, without a license, which is never refused, but an expense of about nine pounds must be incurred in obtaining it. (Note by Chitty.)

² Cod. 2-9, 1.

³ Ibid. 2-7, 13.

⁴ "Preaudience in the courts is reckoned of so much consequence," says Blackstone, in a note, "that it may not be amiss to subjoin a short table of the precedence which usually obtains among the practicers: 1. The king's premier-serjeant, so constituted by special patent. 2. The king's ancient serjeant, or the eldest among the king's serjeants. 3. The king's advocate-general. 4. The king's attorney-general. 5. The king's solicitor-general. 6. The king's serjeants. 7. The king's counsel, with the queen's attorney and solicitor. 8. Serjeants at law. 9. The recorder of London. 10. Advocates of the civil law. 11. Barristers. In the Exchequer, now a branch of the High Court, two of the most experienced barristers, called the post-man and the tub-man, (from the places in which they sit) have also a precedence in motions"

⁵ Seld. tit. Hon. 1, 6, 7.

⁶ Davis, pref. 22: 1 Ch. Rep. 38.

no action for his fees ; which are given, not as *locatio vel conductio*, but as *quiddam honorarium* ; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation ; as is also laid down with regard to advocates in the civil law, whose *honorarium* was directed by a decree of the senate not to exceed, in any case, ten thousand sesterces, or about eighty pounds of English money.¹ And in order to encourage due freedom of speech in the lawful defense of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honorable professions) it hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand, and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless ; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured.² And counsel guilty of deceit or collusion are punishable by the Statute Westminster 1, 3 Edw. I, chap. 28, with imprisonment for a year and a day, and perpetual silence in the courts—a punishment still sometimes inflicted for gross misdemeanors in practice.”³

The text of Blackstone has been given intact, as illustrating the condition of things in England at the time he wrote. It now becomes necessary to point out the modifications requisite to be made in the text before it can be regarded as a correct exposition of present law, and to note the changes that have occurred since that time. The degree of serjeant was deprived of its most profitable, if not most important, advantage, (exclusive audience in the Court of Common Pleas)⁴ by the Statute 9 and 10

¹ Tac. Ann. lib. 11.

² Brook v. Montague, Cro. Jac. 90; see also, as establishing the correctness of this position, Hodgson v. Scarlett, Holt N. P. 621; 1 Barn. & Ald. 232; 1 Saund. Rep. 130. The publication of the counsel's statement by a third party may, however, expose such a third party to an action. (Flint v. Pike, 4 Barn. & C. 473.)

³ Hughes v. Seirace, 2 Atk. 173; 3 Com. B. N. S. 804.

⁴ See, as to their former privileges, The Serjeants' Case, 8 Scott, 430; 8 D. P. C. 268; 6 Bing. N. C. 187, 232.

Vict., chap. 54, which extended to all barristers the privileges of serjeants in the Court of Common Pleas. The serjeants had been limited to fifteen in number, and had the monopoly of the practice in that Court. A bill was introduced into Parliament in the year 1755, for the purpose of destroying this monopoly, but it did not pass. In 1834, a warrant under the sign-manual of the crown was directed to the judges of the Common Pleas, commanding them to open that court to the bar at large, on the ground that it would tend to the general dispatch of business. This order was received, and the court obeyed. In 1839, the matter was brought before the court by the serjeants, when it was decided that the order was illegal, Tindall, C. J., declaring that "from time immemorial the serjeants have enjoyed the exclusive privilege of practicing, pleading, and audience in the Court of Common Pleas. Immemorial enjoyment is the most solid of all titles; and we think the warrant of the crown can no more deprive the serjeant, who holds an immemorial office, of the benefits and privileges which belong to it, than it could alter the administration of the law within the court itself."¹ Afterward, however, the Statute 9 and 10 Vict., chap. 54, as already stated, extended to all barristers the privileges of serjeants in the Court of Common Pleas. In regard to preaudience, by the king's mandate, December 14th, 1811, the king's attorney and solicitor-general were ordered to have a place and audience before the king's premier-serjeant.

The various statutes mentioned by Blackstone as regulating attorneys have been consolidated and amended by the Statute 6 and 7 Vict., chap. 73,² which prescribes the conditions of their admission, the time and mode of their preliminary service as a clerk under articles, and the examinations which have to be passed before they can receive their certificate, a document which entitles the holder to admission in all the courts of the kingdom.

The admission of the judges of the common-law courts of Westminster into the order of serjeants before advancement to

¹ Serjeant's Case. See also 10 Bing. 571; Bing. N. C. 187, 232, 235.

² 7 and 8 Vict. chap. 86; 14 and 15 Vict. chap. 88. See also 23 and 24 Vict. chap. 127; 33 and 34 Vict. chap. 28; 35 and 36 Vict. chap. 81.

the bench was rendered unnecessary by the English Judicature Act of 1873.

The order of preaudience in the courts is now : 1. The attorney-general. 2. The solicitor-general. 3. The regnant queen's premier serjeant, so constituted by special patent, when appointed. 4. The regnant queen's ancient serjeant, or the eldest among the regnant queen's serjeants, when appointed. 5. The regnant queen's serjeants. 6. The regnant queen's counsel and those barristers who have obtained patents of precedence, according to the precedence assigned to them. 7. Serjeants at law. 8. The recorder of London. 9. Advocates of the civil law. 10. Barristers.¹

The barristers or serjeants who have received letters-patent of precedence, and the queen consort's attorney and solicitor-general, when the sovereign is a king, rank promiscuously, and, together with the queen's counsel, sit within the bar of the respective courts.²

For gross misdemeanors in practice, on the part of barristers, the course usually now resorted to is for the benchers of the inn of court to which the offender belongs to disbar him.³

Students who do not wish to be called to the bar may obtain permission to practice *under the bar*. This class of practitioners have hitherto been called *special pleaders* or *equity draftsmen*, according as they prepared pleadings in the common law or equity courts, or *conveyancers*, if they prepared deeds. These distinctions are also in general preserved after the call to the bar. Special pleaders, equity draftsmen, and conveyancers who have taken out certificates to practice, *under the bar*, and therefore are not *counsel*, may recover their reasonable charges for business done by them.⁴

"Advocates or attorneys," says Blackstone, "that betray the cause of their client, or, being retained,⁵ neglect to appear at

¹ 3 Kerr's Blackst. Com. 26, note.

² Ibid. As to the nature of the inns of court, see *Rex v. The Benchers of Lincoln's Inn*, 4 B. & C. 855. As to the terms to be kept, and the examinations, see the regulations issued by these societies. *Ante*, Introd.

³ 3 Kerr's Blackst. Com. 28.

⁴ *Poucher v. Norman*, 3 Barn. & C. 744.

⁵ L. 183; 3 Blackst. Com. 165.

the trial, by which the cause miscarries, are liable to an action on the case for a reparation to their injured client." Blackstone cites Finch as authority for this position; but Finch does not sustain him to the full extent. Finch simply lays down the law in the case of an attorney for the tenant in a real action making default; and F. N. B. 96, which is *his* authority, goes no further. As the advocate can maintain no action for his fees, there would be some hardship in exposing him to an action for what his client might consider want of proper zeal, industry, or knowledge in the conduct of his cause. In two cases at *nisi prius*, Lord Kenyon held such actions not maintainable.¹

In the United States there is no distinction between attorneys and advocates. The same persons fulfill the duties of both. Hence, no difference is made between their rights to recover compensation for services in the one capacity or the other. The attorney is liable for want of ordinary care and skill. When he disobeys the lawful instructions of his client, and a loss ensues, for that loss he is responsible. But a client has no right to control his attorney in the due and orderly conduct of a suit; and it is his duty to do what the court would order to be done, though his client instruct him otherwise.²

Barristers cannot serve as articled clerks, for the purpose of being admitted as attorneys, without being disbarred.³ The courts cannot interfere in questions as to their retainers.⁴

A barrister, by accepting a brief in the usual way, undertakes a duty, but does not enter into any contract, express or implied. No action lies against him when employed to conduct a cause at *nisi prius*, if he enters into a compromise and withdraws a juror, even though contrary to his client's instructions, provided it is done *bona fide*. The conduct and control of the cause are left to him. But he has not, by virtue of his retainer,

¹ 3 Blackst. Com. 165, note by Coleridge; *Fell v. Brown*, Peake, 96, 131; *Turner v. Phillips*, *Ibid.* 122-166.

² 3 Blackst. Com. 165, note by Sharswood; *Gilbert v. Williams*, 8 Mass. 57; *Holmes v. Peck*, 1 R. I. 245; *Cox v. Sullivan*, 7 Ga. 144; *Cox v. Livingston*, 2 Watts & Sargent, 103; *Wilcox v. Plummer*, 4 Peters, 172; *Anon.* 1 Wend. 108.

³ *In re Bateman*, 6 Q. B. 853; 9 Jur. 29; 14 Law J. Q. B. 89. See as to barristers practicing in various courts, 15 and 16 Viet., chap. 54, sec. 10; 20 and 21 *Ibid.*, chap. 77, sec. 45; chap. 85, sec. 15; 21 and 22 *Ibid.*, chap. 95; 22 and 23 *Ibid.*, chap. 6.

⁴ *Baylis v. Grout*, 2 Mylne & K. 316; *Ex parte Elsee*, 1 Montague, 69; *Taylor v. Clarke*, 13 I. R. C. L. 571.

any power over matters collateral. The barrister, acting in good faith, and with a single view to the interests of his client, is not responsible for mistake, error, or indiscretion of judgment. But a barrister may be responsible on an express agreement, or if he acts toward his client with fraud, malice, or treachery.¹

An action will not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matter in issue. But although counsel, in the discharge of their duty, are privileged to utter matter injurious to individuals, the subsequent publication of such matter is unlawful.² A party in a matter in court had kept a sum of money which, by his contract, he ought not to have kept; counsel, in reference to this matter, used the language: "This gentleman has defrauded us." The words were held not actionable,³ and not irrelevant to the matter before the court. A barrister may be punished for contempt of court, even for language professedly used in the discharge of his functions as advocate; as where, on a trial for felony, the counsel for the prisoner, whose mode of conducting the case had been remarked upon by the foreman of the jury, in his address to the jury uttered words which reflected upon the foreman, and being required by the judge to withdraw them, refused, and was thereupon adjudged guilty of contempt, and fined; upon motion for a *certiorari* to remove the order, it was held, that as the words used might have been, and were by the judge adjudged to have been, used to insult the juror, there was no excess of jurisdiction, and the appellate court could not interfere.⁴

No action lies against a barrister for misconduct in the management of a cause, nor to recover a fee given to him to argue a cause which he did not attend;⁵ nor for negligence in not attending a trial.⁶ A barrister is privileged from arrest (like others of the profession) whilst in attendance on the courts, and

¹ *Swinfen v. Chelmsford*, 5 Hurl. & N. 890; 29 Law J. Exch. 382; 6 Jur. N. S. 1035; 8 Week. R. 545; 2 L. T. N. S. 406.

² *Hodgson v. Scarlett*, 1 Barn. & Ald. 232; *Flint v. Pike*, 6 Dowl. & R. 528; 4 Barn. & C. 473.

³ *Needam v. Dowling*, 15 Law J. Common Pleas, 9.

⁴ *Ex parte Pater*, 5 Best & Smith, 299; 9 Cox C. C. 544; 10 Jur. N. S. 972; 33 Law J. M. C. 142; 10 L. T. N. S. 376.

⁵ *Fell v. Brown, Peake*, 96, 122; *Turner v. Phillips, Peake*, 122.

⁶ *Mulligan v. McDonough*, 2 L. T. N. S. 136; 5 Irish Jur. N. S. 101.

therefore will be discharged if arrested on the circuit,¹ and returning from court.² Advocates conducting causes cannot be examined as witnesses therein, nor can they be heard in their own cases after their own counsel have addressed the court.³

The court will not enforce by attachment an agreement of compromise, made by counsel on behalf of his client, if it is at all doubtful whether the client is bound to perform the agreement, nor will a court of equity enforce such a compromise by a specific performance.⁴ But where there had been a conference between a party to an action and his counsel and attorney, as to the terms of compromising such action, and there was evidence that the client had authorized his counsel to do the best for him he could, and the counsel afterward settled such action in court whilst the client was actually present, the court refused to set aside the order of *nisi prius* made according to the terms of such settlement, notwithstanding the client made an affidavit that the action was settled without his authority, and that, although present in court, he did not understand what was going on.⁵ Where a jury had given excessive damages, and the court was reluctant to interfere to set aside the verdict, but recommended a compromise, counsel had authority to consent to such a compromise in the absence of their clients, such consent being considered within their ordinary authority.⁶

It is within the general authority of counsel retained to conduct a cause, to consent to the withdrawal of a juror, and the compromise, being within the counsel's apparent authority, is binding on the client, notwithstanding he may have dissented,

¹ In re Hipsey, 1 H. Black. 636; In re Oxfordshire, 2 Car. & K. 200; In re Kent, 2 Car. & K. 197; 15 Law J. Q. B. 268.

² Luntly v. Nathaniel, 2 D. P. C. 51; 1 Crompt. & M. 579; Newton v. Harland, 8 Scott, 70; Rubenstein v. —, 10 I. C. L. R. 386.

³ Dunn v. Packwood, 1 B. C. R. 312; 11 Jur. 242; Stones v. Bacon, 4 Dowl. & L. 393; 1 B. C. R. 248; 11 Jur. 44; 16 Law. J. Q. B. 32; Newton v. Chaplin, 10 Com. B. 356; 14 Jur. 1121; 19 Law J. Com. P. 374; but see Nicholson v. Styles, 2 Ex. 213; 12 Jur. 681; 17 Law. J. Ex. 229.

⁴ Swinfen v. Swinfen, 1 Com. B. N. S. 364; 3 Jur. N. S. 85; 26 Law J. Com. P. 97; 2 DeGex & J. 381; 4 Jur. N. S. 774; 27 Law J. Ch. 491.

⁵ Chambers v. Mason, 5 Com. B. N. S. 59; 5 Jur. N. S. 148; 28 Law J. Com. P. 10.

⁶ Thomas v. Harris, 27 Law J. Ex. 353.

unless his dissent was brought to the knowledge of the opposite party at the time.¹

When a party appears in court by counsel, and the case is on, and the counsel has been fully seized of it, his authority cannot be revoked by his client, so as to give the client a right himself to address the court. But if counsel is not so seized, as where, upon a motion, the hearing has proceeded no further than the reading of affidavits, and the counsel has addressed no arguments to the court, he may, at the instance of his client, be permitted to withdraw, and the client himself may be heard.² A statement made by counsel, upon his address to the jury, but in the hearing of his client, is binding on the client, if he makes no objection.³ When a party appears by counsel before the court or a judge at chambers, in any stage of a cause, and counsel makes an admission of a fact, though unsupported by affidavit, the court will regard such statement as presumably true, and will admit it in evidence when offered by the other side. Statements of counsel will be received, when made in the discharge of their functions as counsel, and are relevant to the matter at issue, and especially when made for the purpose of influencing the judge to take a step in favor of their clients.⁴

The English attorney has no implied authority to bind his client by an undertaking to a barrister that the client will pay him, if he receipts, for the purpose of fees, then due; nor will a subsequent receipt out of court, by the client of taxed costs, which include those fees, make him liable to the barrister, without more, for money had and received.⁵ A promise made by a client to pay money to a counsel for his advocacy, whether made before or during or after the litigation, has no binding effect, the relation of counsel and client rendering the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation.⁶

¹ *Strauss v. Francis*, 1 Law R. Q. B. 379; 12 Jur. N. S. 486; 35 Law J. Q. B. 133; 14 Week. R. 634; 14 L. T. N. S. 322; *Lynch v. Coel*, 13 Week. R. 846; 12 L. T. N. S. 548.

² *Reg. v. Maybury*, 11 L. T. N. S. 566.

³ *Colledge v. Horn*, 3 Bing. 119; 10 Moore, 431.

⁴ *Haller v. Worman*, 9 Week. R. 348; 3 L. T. N. S. 741.

⁵ See *O'Brien v. Cantwell*, 12 L. Chancery R. 221.

⁶ *Kennedy v. Brown*, 13 Com. B. N. S. 677; 9 Jur. N. S. 119; 32 Law J. C. P. 137; 11 W. R. 284; 7 L. T. N. S. 626.

Thus, a conveyance of a large estate by a client to a barrister, who had been successfully engaged for her in recovering the estate, in consideration of his services, was set aside for undue influence. It was held that such a deed could not be supported, either on a previous contract to pay her £20,000, or as executed in performance of a moral obligation.¹

§ 30. A "counsel" is an advocate associated in the management of a particular cause, or one who acts as a legal adviser in reference to any matter requiring legal knowledge and judgment.² In the Supreme Court of the United States, the two degrees of attorney and counsel were at first kept separate, and no person permitted to practice in both capacities.

It is the duty of counsel to draft or review and correct the special pleadings; to manage the cause on trial, and during the whole course of the suit to apply established principles of law to the exigencies of the case.³

In the United States, as a general rule, the same person may, and often does, perform the duties of both attorney and counsellor. In the Supreme Court of the United States one may now be admitted as attorney and counsellor.

In England, the term "counsel" is applied to the barristers.

§ 31. A lawyer is one skilled in the law; one whose profession is to give advice and assistance in legal matters, and to prosecute and defend in courts the causes of those who may employ him for the purpose. This designation comprehends the several classes known as attorneys, solicitors, proctors, counsellors, barristers, and advocates, who, with various privileges, and in different capacities, give aid in expounding, applying, and enforcing the law, or in the preparation of legal documents.⁴

§ 32. Proctor.—The term "proctor" is a special term, applied to legal practitioners in the admiralty and ecclesiastical courts. It appears to be a contraction of the Latin *procurator*.

¹ *Brown v. Kennedy*, 33 Beav. 133; 9 Jur. N. S. 1163; 33 Law J. Ch. 71; 9 L. T. N. S. 302. Affirmed on appeal, 10 Jur. N. S. 141; 33 Law J. Ch. 342; 12 Week. R. 360; 9 L. T. N. S. 736.

² Bouv. Dic.

³ 1 Kent Com. 307. But an attorney might have his name struck off the roll of attorneys, and placed on the list of counsellors. (*Hallowell's Case*, 3 Dall. 410.)

⁴ T. M. Cooley, L.L. D.; New Am. Encyc. 1875, ad verb.

§ 33. **The office of serjeant at law.**—On November 2nd, 1875, the time of the coming into operation of the Supreme Court of Judicature Act in England, the institution and office of serjeant at law virtually came to an end. For centuries, the office had been one of great importance. Much is said of its dignity in the reigns of Henry VII and Henry VIII. The honor it conferred upon the few it was the custom to appoint was one of distinction, and carried with it exclusive privileges. It was created by the king's writ, and the call was accompanied with solemnities and ceremonies.

It is said that the order flourished before the Conquest. Men who had studied the laws in Normandy came to England with the king, and thus obtained a writ to the degree by the advice of his council. They administered the law generally in counties, and the king had serjeants in every county, to prosecute pleas of the crown. Serjeants are mentioned in the Year Books as early as Edward I, and by Bracton, and in the "Mirror of Justice." In the superior courts of Normandy, litigants themselves were allowed to plead by their "conteurs"; but on the introduction of the Norman system into the Superior Court of England, parties were not allowed to conduct their own causes, but were compelled to engage persons conversant with the law to conduct their suits.¹ These officers were termed "*countors*," and the amount of fees received by them seems to have induced the conversion of the office into serjeanty, which was effected by royal mandate, in respect of serjeants practicing in *Aula Regia*, otherwise the Court of Common Pleas, and by letters-patent in respect of those practicing in Dublin. They were called *narratores*, *counters*, or *conteors*, because the count or declaration comprehended the substance of the original writ and the foundation of the suit.

Serjeants were recognized by name and office in the Statute of Westminster. The judges of the courts of law, by custom, and in order to enable them to hold assizes, must have been of the rank of serjeants. The serjeant's duty originally was to frame the pleadings in each cause, for which he was responsible for deceit, or interruption of the due course of justice; hence

¹ London Law Mag. and Rev.; 3 Am. Law Record, 257.

the ancient rule of the serjeant's hand being put to all pleas. Their oath, according to Lord Coke, consisted of six parts: "1. That he shall well and truly serve the king and his people, as one of the king's serjeants at law. 2. That he shall truly counsel the king in his matters when he shall be called. 3. And duly and truly minister the king's matters "after the course of the law to his conning." 4. He shall take no wages or fee of any man for any matters where the king is party against the king. 5. He shall, as duly as hastily, speed such matters as any man shall have to do against the king in the law, as he may lawfully do without delay, or tarrying the party of his lawful process in that belongeth to him. 6. He shall be attendant on the king's matters when he shall be called thereto."

The distinction between a serjeant and an ordinary advocate was that serjeants were sworn not to attend to the behests of the crown alone, but to serve the king's people against the king, while apprentices were called for no particular object, and were not sworn. They had exclusive right of practice in one particular court, and their services were always brought into requisition in the leading and better class of business in the profession. Though not by the oath were they bound to serve the king, yet in several instances Parliament compelled them to defend the throne, and also called upon them to attend at the trial of petitions in the House. They were exempt from knighthood, which, by the common law of the period, was imposed upon persons having a pecuniary standard, and was considered by many more a burden than an honor. In the reign of Henry VI, a serjeant, having refused to appear to receive the order of knighthood, pleaded his privilege, which was accepted. No serjeants were knights till the latter part of the reign of Henry VIII. Serjeants had also an exclusive right of practicing in the Marshalsea Court, a court for the trial of causes for the recovery of small debts, abolished by the County Courts Act; but this right was taken away by statute in the reign of Henry VIII. They were exempt from being empaneled at the grand assize.¹

They signed pleas, and were frequently consulted by the judges on points of law, and were eligible to sit as judges at

¹ London Law Mag. and Rev.; 3 Am. Law Record, 234.

assize. The appointment was always considered one of rank and distinction. Out of the ordinary serjeants at law the king appears to have appointed his own, called "king's serjeants," and in the reign of Edward I these serjeants had pensions assigned them for their services, out of the exchequer, and afterward it is recorded that they received twenty pounds a year for attending to the business of the king.

The last of the queen's ancient serjeants died in 1866. Since then, the offices of the queen's chief or first serjeant, the queen's ancientest serjeant, and the queen's serjeant have been vacant. The Supreme Court of Judicature Act of 1873, by section 8, provides that "henceforth no person appointed a judge should be required to take or have taken the degree of serjeant at law."

In Ireland, the crown appoints three barristers to the rank of serjeants, who take precedence of the queen's counsel, except the attorney-general and solicitor-general. It is a patent office, to which a small salary is attached. They are crown officers, and included in the commission. They never had the exclusive right to practice in the Court of Common Pleas in Dublin. The office there dates from 1326.¹

§ 34. Solicitor.—The term "solicitor" appears to be derived from the Latin *solicitare*, and in English practice has been applied to a person practicing in the courts of equity; one whose business is to be employed in the care and management of matters and suits in chancery. It is also the term usually applied in England to an attorney in proceedings before Parliament, the Court of Privy Council, and generally in proceedings unconnected with the courts of common law. The term does not appear in very ancient statutes. It was first used in the Statute 3 Jac. I, chap. 7, since which it has been used in nearly all the subsequent statutes relative to attorneys.

The apparent etymology of the word sanctions the meaning of a person taking care of, prosecuting, or superintending the affairs of others, more particularly matters in litigation. The vocation of *common solicitors*—or persons well practiced in su-

¹ London Law Magazine and Review; 3 Am. Law Record, 270. See also *ante*, Introd., and *ante*, sec. 29.

ing out process, soliciting causes, and managing the evidence, and subordinate to and distinct from the office of attorney—seems, long previously to the English statutes in regard to attorneys, to have been known and recognized in the common-law courts.¹ But in modern times the term “attorney” has been made use of in common-law proceedings, and that of “solicitor” in the equity courts. The solicitor is in equity what the attorney is at common law.

Under the recent English Supreme Court of Judicature Acts of 1873 and 1875,² all persons admitted as solicitors, attorneys, or proctors, empowered to practice in any court, the jurisdiction of which is by these acts transferred to the High Court of Justice, or the Court of Appeal created by the acts, are to be called “solicitors of the Supreme Court,” and are entitled to the same privileges, and subject to the same obligations, so far as circumstances permit, as if the acts had not been passed; and all persons who would have been entitled to be admitted as solicitors, attorneys, or proctors, or empowered to practice in the other courts, are entitled to be admitted, and to be called solicitors of the Supreme Court, and are admitted by the master of the rolls, and are entitled as such solicitors, as before mentioned. They are officers of the Supreme Court; and that court, and the High Court of Justice, and the Court of Appeal, respectively, or any division or judge thereof, may exercise the same jurisdiction over them as any one of the superior courts of law or equity might have done before.

The registrar of attorneys and solicitors in England is called the “registrar of solicitors”; and the lord chief justice of England, the master of the rolls, and lord chief justice of the Court of Common Pleas, and the lord chief baron, or any two of them, may, from time to time, by regulations, adopt any enactments relating to attorneys, and any declaration, certificate, or form required under those enactments to the solicitors of the Supreme Court.

¹ 55 Geo. III, chap. 184; Sch. part 1, tit. Admission; see term “solicit,” in 6 and 7 Vict., chap. 73, secs. 2, 27; *Rolls v. Germaine*, Cro. Eliz. 459; 3 Jac. 1. chap. 7; *Thursby v. Warren*, Cro. Car. 160.

² 36 and 37 Vict., chap. 66, sec. 87; 38 and 39 Vict., chap. 77, sec. 14.

§ 35. Use of terms in this work.—In the following pages the author has discovered the necessity of selecting and adopting some general term, that will apply to *all* members of the legal profession, and that will be understood to so apply, whenever the law relative to the profession is discussed, without reference or restriction to any particular class or branch of it. As has been seen, the term “barrister” is an English name for a particular branch of the profession, and includes only those practicing at the bar, or who try causes, as distinguished from the English attorneys and solicitors, who do not. The term “advocate” is a term of similar import, and has therefore been rejected as a generic term. The term “solicitor” has in modern times, in England, been applied to the class who fulfill in the courts of equity, and in chancery proceedings generally, the same duties as the English attorney does in the courts of common law. Its meaning is, therefore, limited, and it cannot properly be applied to the entire body of lawyers. “Counsel” or “counsellor” has, in England, much the same signification as “barrister.” The words “serjeant,” “proctor,” “procurator,” etc., are obviously words of still less scope, and manifestly out of the question. To coin a word would probably not be acceptable to the profession. To make use of a paraphrase is a cumbrous mode of expression, giving additional labor to an author, and inconvenience to the reader. In this predicament—one which well illustrates the oft-lamented poverty of the English language as regards technical and precise terms—the choice seemed to be narrowed down to the selection of one of the two terms, “lawyer” or “attorney at law.” To each of these there are objections, but they are of less inherent importance than the objections to the other terms mentioned.

Against the phrase “attorney at law” it may be said that in England, though not generally in the United States of America, the term “attorney” has been used in contradistinction to their brethren of the same grade in the courts of equity—the solicitors. It may also be said, it has been used in contradistinction to the orders of the profession higher than either the attorneys or solicitors, viz., the barristers and serjeants. Both of these propositions are true. To use the term “attorney” alone may be open to the further objection that it might include attorneys in.

fact; but this last is not thought a serious obstacle, as it will not be deemed a violent presumption that the reader will exclude attorneys in fact from his mind in a work wholly occupied with the law relative to the members of the legal profession.

Without reference to custom or fashion, perhaps the term "lawyer" would be the most comprehensive, and etymologically the most correct of any; but here steps in the very comprehensiveness of the term as an objection; for lawyers are often judges, or, to transpose the phrase, it is very often that judges are lawyers; and it is not of the law governing the judiciary that we desire to speak. Besides, while a layman generally speaks of a member of the bar as a lawyer, the latter generally prefers, for some reason, or from force of habit, or custom without a reason, to style himself, in America, an attorney, or counsellor at law, or both; or simply counsel, or an advocate, etc., etc.; and in England he calls himself whatever he is, strictly speaking—a barrister, an attorney, a solicitor, or a proctor.¹

The term "attorney," or "attorney at law," (and in the ensuing pages the latter is always meant by the former term without more) has, therefore, seemed the least objectionable in common use. When the word is used in the restricted English sense, there will always be found something in the context to denote that it is used as signifying an English attorney, and not generally; but otherwise it will mean, as its etymology indicates, any member of the legal profession employed in "the turn, place, or stead of his client" in legal proceedings and suits in court, be he attorney, counsellor, advocate, barrister, solicitor, or proctor.

Besides, in America, the English distinctions have not been generally preserved. The common law is made the basis of jurisprudence in nearly all the States. The courts exercise a mixed law and equity jurisdiction. Attorneys and solicitors are both called attorneys, and attorneys fulfill the office of barristers and advocates, and *vice versa*. In one State, however, an exception exists: New Jersey has a distinct court of chancery;

¹In many of the State courts of the United States, and in the Federal courts, the license gives him power to practice "as an attorney and counsellor at law, solicitor in chancery, and proctor in admiralty," etc., etc.

its practitioners are known as solicitors. But in New York, with the destruction of the distinct chancery jurisdiction, the term "solicitor" fell into disuse; and Story, and other elementary writers, use the term "attorney" in treating of matters both of law and equity. With this authority, and for the above reasons, the term will be so used, except where otherwise plainly indicated. For the sake of variety, the term "lawyer" will not be entirely discarded as a generic term.¹

¹ "The term 'attorney at law' may be regarded as comprehending all grades of practicing lawyers. In England, the term 'attorney' is technically restricted so as to exclude not only solicitors in chancery and proctors in admiralty, but counsel and barristers in proceedings at common law. In the United States, counsel, proctors, and solicitors are governed by the same general rules as attorneys. The term 'attorney at law' may, therefore, be used as a general term to cover all cases of persons who are skilled in the law, and who are appointed to represent others in litigation and in legal matters." (Wharton on Agency, sec. 555; *Ingraham v. Richardson*, 2 La. An. 839; *Trowbridge v. Weir*, 6 Ibid. 706.)

CHAPTER II.

THE VOCATION OF THE LAWYER—GENERAL NATURE OF HIS OFFICE—QUALIFICATIONS.

- § 36. The lawyer's vocation.
- § 37. Character of the office.
- § 38. Test-oath cases in the United States Supreme Court.
- § 39. And in California.
- § 40. Who may be attorneys—Admission of women as attorneys.
- § 41. Taxation of the profession.

§ 36. The lawyer's vocation.—The first portion of this work will be devoted to a consideration of the *vocation* of the lawyer regarded as a vocation merely, and generally separate and distinct from the subjects arising out of the *relation* existing between the lawyer and his client. In treating of the vocation of the lawyer, the following topics will be reviewed in the order named: 1. The general nature of the vocation, and nature of the attorney's office, and the general qualifications which the attorney must possess. 2. Admission to the bar, and the rules and regulations governing that admission. 3. Removal and suspension from the bar, and striking from the rolls, including the offenses and improprieties which will authorize the infliction of these punishments, and call for the exercise, in these and various other ways, of the summary jurisdiction of the court over attorneys; the removal of these disabilities, and the consequent readmission of the attorney. 4. The privileges, disabilities, and liabilities of an attorney as such, without special reference to the relation between attorney and client, which will be treated of when that relation is reached.

The first of the subdivisions above mentioned constitutes the subject-matter of this chapter.

§ 37. General nature of the vocation.—In considering the vocation of the lawyer *as* a vocation, and entirely distinct from the professional relation with the client, the most import-

ant question to be answered is, Does the vocation take the character of an office, and if so, what is the nature of the office? Is it a Government or State office; is it civil, public, or private; is it an office of trust, within the meaning of many of the State constitutions; or is the attorney simply an officer of the court, and no more? These queries have given rise in America to many grave and able discussions upon questions of constitutional law. During the Civil War in the United States, many of the State legislatures passed what were known as "Test-oath Acts," prohibiting public officers, civil officers, persons holding offices of trust, etc., from exercising the functions and receiving the emoluments of their offices, unless they should first take an oath, differing somewhat in phraseology in the different States, but very little in substance, and to the general effect that the affiant had given, voluntarily, no aid, comfort, or encouragement to any person or pretended government then in armed hostility or inimical to the Government of the United States. The first phase of the question came up in considering whether or not an attorney was a public officer, or person holding an office of trust or profit within the meaning of the acts. The first legislation did not expressly mention attorneys at law. In West Virginia and Maryland, the language was: "Every person elected or appointed to any office of trust, civil or military." And the Court of West Virginia held that attorneys were not officers within the meaning of that act, and could not be debarred from practice for a refusal to take the oath.¹ In Tennessee, an act² required the courts to administer the abjuration of the so-called "Ku Klux Klan" to "all officers." And it was held that this language did not apply to attorneys at law, and the courts had no power to require such oath by a general rule; and if a judge improperly excluded an attorney from practice, and refused to put the order on record, or allow an appeal, he was a proper defendant to a mandamus suit, and liable for costs.³

Other States pursued a similar course in construing similar statutes, until it seemed necessary to admit that an attorney at law was not a Government officer, nor a civil nor public officer,

¹ *Ex parte Faulkner*, 1 W. Va. 269.

² Statutes, 1868, chap. 2, sec. 5.

³ *Ingersoll v. Howard*, 1 Heisk. 247; *Champion v. State*, 3 Cold. 114.

nor a holder of a public office of trust or profit, within the meaning of those acts. This being tolerably well established by the weight of authority, the legislatures went a step further, and passed similar test-oath acts, directly aimed at and naming attorneys at law as a class. Congress also passed such an act,¹ and a rule of the Supreme Court enforced it. Then came the question of the constitutionality of these later acts, and the whole question was fully discussed in the Supreme Court of the United States, and finally decided.

We shall dwell on these cases somewhat more than will in future be necessary as regards single cases; (1) because we have the views of the highest tribunal in America upon the subject, and (2) because of the inherent importance and interest of the subject itself.

§ 38. Test-oath cases in the United States Supreme Court.—The whole matter received a full consideration in the case of *Ex parte Garland*, 4 Wall. 332, in the Supreme Court of the United States. An act of Congress² provided that certain persons should swear or affirm that they had never voluntarily borne arms against the United States; that they had not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that they had neither sought nor accepted, nor attempted to exercise the functions of, any office whatever, under any authority, or pretended authority, in hostility to the United States; and they had not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto, etc.

Another act of Congress provided that after its passage no person should be admitted as an attorney and counsellor to the bar in the United States courts without taking and subscribing the oath prescribed in the former act.

Garland followed the State of Arkansas in the act of secession from the Union, and was one of her representatives—first in the lower house, and then in the Senate of the Confederate Con-

¹ Act of Jan. 24th, 1865, 13 U. S. Stats. 424.

² Act of July 2nd, 1862, 13 U. S. Stats. 502; Act of Jan. 24th, 1865, 13 U. S. Stats. 424.

gress. July, 1865, he received from the President of the United States a full pardon for all offenses committed by his participation, direct or implied, in the Rebellion. He produced that pardon, and asked permission to continue to practice as an attorney and counsellor of the court, without taking the oath, which he was unable to take, by reason of the offices he held under the Confederate Government.

He rested his application upon two grounds :

1. That the Act of 1865 was, so far as it affected his status in the court, unconstitutional and void. And—

2. That if the act was constitutional, he was released from compliance with its provisions by the pardon of the President.

The court held that an exclusion from any of the professions, or any of the ordinary avocations of life, for past conduct, can be regarded in no other light than as punishment for such conduct. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included. Field, J., said :

“The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States ; they are not elected nor appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning, and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In the Supreme Court of the United States, the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning ; and the statement of counsel moving their admission, sufficient evidence that their private and professional character is fair. The order of admis-

sion is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct cases therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been afforded.¹ Their admission or their exclusion is not the exercise of a mere ministerial power." It is the exercise of judicial power,² and for this reason mandamus will not lie to vacate an order removing an attorney and counsellor. It rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney or counsellor, and for what cause he ought to be removed.

The attorney or counsellor, therefore, being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. But in the test-oath cases the question was whether that power had been exercised as a means for the infliction of punishment, against the prohibition of the Constitution.

That this result cannot be effected indirectly by a State under the form of creating qualifications, was held in the case of *Cummings v. Missouri*,³ and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress. This view was considered strengthened by a considera-

¹ *Ex parte Garland*, 4 Wall. 378; *Ex parte Heyfron*, 7 How. Miss. 127; *Fletcher v. Daingerfield*, 20 Cal. 430.

² *Ex parte Garland*, 4 Wall. 378; *Ex parte Cooper*, 22 N. Y. 81; *Ex parte Seacombe*, 19 How. 9.

³ 4 Wall. 277.

tion of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President. The Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." (Art. II, sec. 2.) The power thus conferred is unlimited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

As to the effect and operation of a pardon, all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limit to its operation, it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.

The pardon produced by Garland was a full pardon "for all offenses by him committed, arising from participation, direct or implied, in the Rebellion," and was subject to certain conditions, which were complied with.

The effect of this pardon was held by a majority of the court to relieve the petitioner from all penalties and disabilities attached to the offense of treason committed by his participation in the Rebellion. He was held to be placed beyond the reach of punishment of any kind. To exclude him, by reason of that offense, from continuing in the enjoyment of a previously acquired right, was to enforce a punishment for that offense, not-

withstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation.

It was held not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the Act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one just stated. The prayer of the petitioner was granted, and a rule of court, which required the oath prescribed by the Act of January 24th, 1865, to be taken by attorneys and counsellors, having been unadvisedly adopted, was ordered rescinded.¹

¹ See *Drehman v. Steffe*, 8 Wall. 597. The conclusion reached by the Court in *Ex parte Garland* had been previously reached in the United States Circuit Courts. (In *re Boxter*, by Mr. Justice Trigg; In *re Shorter*, District Court of Alabama; In *re Law*, District Court of Georgia.) See *contra*, *Ex parte Magruder*, 6 Am. Law Reg. N. S. 292; *Ex parte Hunter*, *Ibid.* 410; 2 W. Va. 122; *Ex parte Quarrier*, 4 W. Va. 210. See *Cohen v. Wright*, 22 Cal. 293; *Ex parte Yale*, 24 Cal. 241.

In Alabama, a majority of the Court held that an oath to the effect that the applicant had not engaged or assisted in a duel, was illegal as applied to attorneys, and the applicant was allowed to practice upon taking the other oaths. (In *re Dorsey*, 7 Port. 293; *Ex parte Garland*, 4 Wall. 333; 4 Blackst. Com. 402; 6 Bac. Abr. tit. Pardon; Hawkins, book 2, chap. 37, secs. 34, 54. See *contra*, *State v. Garesche*, 36 Mo. 256. See also, to the same effect, *Ex parte Low*, 35 Ga. 285; *Ingersoll v. Howard*, 1 Heisk. Tenn. 247.)

The term in a test-oath act "all officers" does not apply to attorneys. The courts have no power to require such oath by a general rule. (*Champion v. State*, 3 Cold. 114.)

The dissenting justices, in *Ex parte Garland*, held that the right to practice law as a profession is a privilege granted by the law under such limitations or conditions in each State or government as the law-making power may prescribe. It is a privilege, and not an absolute right. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause, and the right of another to appear and defend for him. The one, like the right to life, liberty, and the pursuit of happiness, is inalienable; the other is the privilege conferred by law on a person who complies with the prescribed conditions.

Every State in the Union and every civilized government has laws by which the right to practice in its courts may be granted, and makes that right to depend on the good moral character and professional skill of the party on whom the privilege is conferred. This is not only true in reference to the first grant of license to practice law, but the continuance of the right is made by these laws to depend upon the continued possession of those qualities. Attorneys are often deprived of this right, upon evidence of bad moral character, or specific acts of immorality or dishonesty, showing that they no longer possess the requisite qualifications. No reason was perceived by the dissenting justices why this

The Supreme Court of the United States held, in *Cummings v. The State of Missouri*,¹ that a legislature may undoubtedly

body of men, in their important relations to the courts of the nation, should not be subject to the action of Congress to the same extent that they are under the legislative control in the States, or in any other government, and to the same extent that the judges, clerks, marshals, and other officers of the court are subject to Congressional legislation.

Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers and prescribe their functions, it was not doubted that Congress had the full right to prescribe terms for the admission, rejection, and expulsion of attorneys, and for requiring of them an oath to show whether they have the proper qualifications for the discharge of their duties.

The Test-oath Act was considered to be nothing more than a statute which required of all lawyers who proposed to practice in the national courts that they should take the same oath which was exacted of every officer of the Government, civil and military. That oath had two aspects, one which looked to the past conduct of the party, and one to his future conduct; but both had reference to his disposition to support or to overturn the government in whose functions the attorney proposed to take a part. In substance, he was required to swear that he had not been guilty of treason to that government in the past, and that he would bear faithful allegiance to it in the future.

1st. The act was considered by the dissenting justices to be not in the nature of a bill of attainder. It was not contended that the act worked a corruption of blood, which was one of the leading features of the English bills of attainder. Nor did it contain a conviction or sentence of any designated person or persons.

The statute, in their opinion, designated no criminal, either by name or description, declared no guilt, pronounced no sentence, and inflicted no punishment on any specific person, and was, therefore, not in the nature of a bill of attainder, and not, therefore, open to any objection based upon its unconstitutionality. (*Ex parte Garland*, Opinion of Dissenting Justices.)

2d. Upon the question as to whether the act was an *ex post facto* law, the only doubt was as to the character of the particular case, and not as to the definition of the phrase. The term is applied to criminal causes alone, and not to civil proceedings. (*Watson v. Mercer*, 8 Peters, 88; *Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 6 Cranch, 87; *Ogden v. Saunders*, 12 Wheat. 266; *Satterlee v. Mathewson*, 2 Peters, 380.)

The law was not regarded as contemplating the *trial* of a person for an offense committed before, or the punishment of any person for such an offense. The oath was simply an oath of office, and it was required of all office-holders alike. Taking an oath of office, or not taking one, is not a criminal proceeding. If not a criminal proceeding, the act was not regarded as an *ex post facto* law. No trial was contemplated for any past offense.

The purpose of the act was to require loyalty as a qualification of all who practice law in the national courts; not to impose a punishment for past acts or disloyalty, no more than the requirement that the President of the United States must be a native-born citizen, which is not regarded in the eye of the law as a punishment inflicted on naturalized citizens.

The statute was, therefore, regarded by the dissenting justices as within the legislative power of Congress, in its control over the courts and their officers, and not void as either a bill of attainder, or as an *ex post facto* law. (See also *Ex parte Hunter*, 2 West. Va. 122.)

¹ 4 Wall. 277.

prescribe qualifications for the office, to which the attorney must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. But it is not a question as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment against the prohibition of the Constitution. This result, the court said, cannot be effected indirectly by a State, under the form of creating qualifications. The States cannot, in effect, inflict a punishment for a past act which was not punishable at the time it was committed; and deprivation or suspension of civil rights is punishment for such conduct.

The case of *Cummings* went to the Supreme Court of the United States on a writ of error to the Supreme Court of Missouri, and involved a consideration of a test oath imposed by the constitution of that State. The plaintiff in error was a priest of the Roman Catholic Church, and was indicted and convicted, in one of the circuit courts of the State, of the crime of preaching and teaching, as a priest and minister of that religious denomination, without first having taken the oath, and was sentenced to pay a fine of five hundred dollars, and to be committed to jail until the fine should be paid. Mr. Justice Field, in an elaborate opinion, contended for, and announced as the views of the court, substantially the following propositions: A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed "a bill of pains and penalties." Within the meaning of the Constitution of the United States, bills of attainder include bills of pains and penalties. These bills may be directed against a whole class, and may inflict punishment absolutely and conditionally.

There was a clause of the Missouri constitution which required priests and clergymen, in order that they might continue in the exercise of their professions, to take and subscribe an oath that they had not committed certain designated acts, some of which were at the time offenses with penalties attached, and some of which were not offenses. This clause constituted a bill of attainder within the meaning of the provisions of the Federal Constitution prohibiting the States from passing bills of that character.

These clauses presumed the parties guilty of the acts specified, and adjudged the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath. They assumed the guilt, and adjudged the punishment conditionally. The prohibition of the Constitution was intended to secure the rights of the citizen against deprivation for past conduct by legislative enactment under any form, however disguised. An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required. By the clauses referred to, a penalty was imposed for some acts which were innocent at the time they were committed, and an increase effected of the penalties prescribed for such of the acts as constituted public offenses. They therefore constituted an *ex post facto* law. Although the prohibition of the Constitution to pass *ex post facto* laws is aimed at civil cases, it cannot be evaded by giving a civil form to that which is in substance criminal.¹

§ 39. The test-oaths in California.—In 1863, the Legislature of California passed an act entitled “An Act to exclude traitors and alien enemies from the courts of justice in civil cases.”² The act provided, among other things, that the defendant in civil suits might object to the further prosecution of the suit on the ground of the disloyalty of the plaintiff, and that then all proceedings should be stayed until the plaintiff should file in the case an affidavit in the following form:

“I, —, do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California; that I will bear true faith and allegiance to the Government of the United States, any ordinance, resolution, or law of any State or Territory, or of any convention or legislature thereof, to the contrary notwithstanding; that I have not,

¹ *Cummings v. State of Missouri*, 4 Wall. 277. In this case, as in its companion case of *Ex parte Garland*, Ibid. 333, Chase, C. J., and Swayne, Davis, and Miller, J.J., dissented from the judgment.

² Statutes 1863, p. 566.

since the —, [*here insert the date of the passage of the act*] knowingly aided, encouraged, countenanced, or assisted, nor will I hereafter, in any manner, aid, encourage, countenance, or assist the so-called Confederate States, or any of them, in their rebellion against the lawful Government of the United States; and this I do without any qualification or mental reservation whatsoever. So help me God.”

The same section also provided the form of oath to be taken by a plaintiff who was a foreigner, and had not been admitted to citizenship; and also that if the affidavit should not be filed within certain periods, prescribed or to be fixed by the court, in case the plaintiff was a non-resident, the case should thereupon be absolutely dismissed, and no other suit should ever be maintained by the plaintiff, his grantees or assigns, for the same cause of action.

It was also provided that no attorney at law should be permitted to practice in any court in the State until he should have taken and filed, in the office of the county clerk of the county in which the attorney should reside, the oath prescribed above. For violation of the provisions, he was also considered guilty of a misdemeanor, and was made subject to fine.

Section 3 of article 11 of the Constitution of California then provided that members of the legislature, and “all officers, executive and judicial, except such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: ‘I do solemnly swear [*or affirm, as the case may be*] that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of — according to the best of my ability.’ *And no other oath, declaration, or test shall be required as a qualification for any office or public trust.*”

In California, therefore, the discussion took a peculiar turn. The constitutionality of the “Act to exclude traitors and alien enemies from courts of justice”¹ had been upheld. But it was objected that, when applied to attorneys, it was in conflict with the clause of the State constitution which provided that all

¹ Act of April 25th, 1863.

officers, executive and judicial, should, before entering on the duties of their respective offices, take and subscribe a certain oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of their offices according to the best of their ability, and proceeding to declare that “no other oath, declaration, or test shall be required as qualification for any office or public trust.”¹

The appearance of an attorney in a cause was objected to on the ground that he had not taken the test-oath prescribed in the State statute. He admitted he had not, but replied that under the clause in the constitution above referred to, he could not be compelled to. The court said: “The terms ‘office’ and ‘public trust,’ as used in section 3, article 11, of the State constitution, are nearly synonymous—at least the term ‘public trust’ is included in the more comprehensive term, ‘office.’ Those duties and responsibilities of a public character that are temporarily or specially devolved upon persons, may be more appropriately denominated public trusts than offices. The persons discharging such duties, or assuming those responsibilities, are officers.

“The form of the oath prescribed by the constitution, as the only oath to be taken by officers and persons executing public trusts, the last part of which is, ‘That I will faithfully discharge the duties of the office of — according to the best of my knowledge and ability,’ clearly indicates that the person who executes a public trust was deemed by the constitution to be an officer.

“The terms ‘office,’ ‘office and public trust,’ as employed in the constitution, have relation only to those persons and duties that are of a public nature. This subject was considered by the Supreme Court of New York, (20 Johns. 492; see Woods’ Case, 1 Hopk. Ch. 6; Seymour v. Ellison, 2 Cowen, 13) in the matter of oaths to be taken by attorneys and counsellors (20 Johns. 492) in which a question arose, whether the act to suppress dueling, passed in 1816, had been repealed by the constitution adopted in 1821. The oath required by that constitution was practically the same as that in the California constitution,

¹ Constitution of California, art. 11, sec. 3.

and was prescribed for the same class of officers. The act to suppress dueling required every officer, (with certain exceptions) and every person who should be admitted as an attorney, counsellor, or solicitor, to take the oath that he had not been engaged in a duel, etc. Mr. Justice Platt in that case says: ‘The point is simply whether an attorney or counsellor holds an office of public trust, in the sense of the constitution. * * In my judgment, an attorney or counsellor does not hold an office, but exercises a privilege or franchise. As attorneys or counsellors they perform no duties on behalf of the government—they execute no public trust.’”

The California court, in *Ex parte Yale*, held that an officer is a person commissioned to perform any public duty, and that an attorney at law is not such an officer, in the constitutional sense of the term, and does not hold a public trust. The courts of Alabama, Virginia, New York, and South Carolina support the same side of the question.¹

Thus far the California court moved in parallel lines with the courts of sister States, but it proceeded to say: “The manners, terms, and conditions of the admission to practice of attorneys, and of their continuing in practice, as well as their powers, duties, and privileges, are proper subjects of legislative control to the same extent, and subject to the same limitations, as in the case of any other profession or business that is created or regulated by statute.”

The State constitution being merely a restriction upon legislative power, and there being no provision of the constitution directly restricting the legislature from exercising plenary control over the qualifications, admission, oath, or duties of attorneys at law, and none arising by implication, the California court considered that the legislature might lawfully require, as a condition to their admission to practice, or their continuance to practice, the taking of the oath prescribed in the act under consideration, or at their pleasure might dispense with all conditions and oaths. The applicant was therefore denied permission to prac-

¹ *Dorsey's Case*, 7 Port. 293; *Leigh's Case*, 1 Munf. 468; *Cooper's Case*, 22 N. Y., 84; *Byrne v. Stewart*, 3 Desaus. Eq. 466.

tice until such time as he should see fit to take the oath mentioned in the act.¹

It will be observed that the California court, agreeing with the weight of authority elsewhere, that an attorney is not a public officer, nor a holder of an office of trust, arrived at a diametrically opposite conclusion as to the right of the legislature to impose such restrictions upon a practicing attorney. While much of the reasoning in *Ex parte Yale* is in consonance with what must now be regarded as an established principle in the Supreme Court of the United States and other courts, the conclusion reached is opposed to it.

An attorney, then, is not a civil, governmental, or public officer; he is not a holder of an office of public trust, within the meaning of the constitutions. He is simply an officer of the court.²

¹ *Ex parte Yale*, 24 Cal. 241; *Cohen v. Wright*, 22 Cal. 324. See *State v. Garesche*, 36 Mo. 256.

² Attorneys of record being officers of the court, their signatures are judicially known to the court, and need not be proven. (*Strippelman v. Clark*, 11 Tex. 298.)

Appointment of counsel—Liability of a county.—In criminal prosecutions, the accused has the right to be heard, and to defend by himself and counsel; and the court will, in case of the inability of the accused to obtain counsel, appoint counsel for him, and compel counsel, as an officer of the court, subject to its authority, to defend the accused against unjust conviction. The law confers on licensed attorneys rights and privileges, and with them imposes duties and obligations, which must be reciprocally enjoyed and performed. The attorney but performs an official duty, for which no compensation is provided. (*Edgar Co. v. Mayo*, 8 Ill. 82; *Vise v. Hamilton*, 19 Ill. 78.) But in criminal prosecutions the people are the prosecutors, not the county, and counties are not liable. The county does not employ the counsel. There is, therefore, no implied promise to pay on the part of the county.

It has been held in Missouri that an additional license may be imposed upon an attorney.

In *Simmons v. Missouri*, 12 Mo. 268, there was a criminal indictment against an attorney for practicing without an additional license, the same being in the nature of an additional tax on their incomes. The law imposing the tax was held constitutional; nor was it considered to impair the obligation of contracts.

A license to practice law, granted to an individual by a judge, cannot be construed a contract, vesting such individual with rights which the legislature cannot interfere with.

None of the essential elements of a contract are to be found in a license to practice law. There is no engagement between the State and the applicant for license that he will follow the practice of the law for a livelihood. No legal consideration is paid the State for the license. The grant of a license is a mere naked grant of a privilege without consideration, and which the applicant may or may not, at his option, avail himself of. Therefore, the State may revoke the privilege granted, or may impose such conditions upon its exercise as are deemed proper or demanded by the public interest. (*Simmons v. State*, 12 Mo. 268; *Egan v. Charles County Court*, 3 Har. & McH. 169.)

§ 40. Who may be attorneys—Admission of women as attorneys.—The question as to who is eligible to hold the position of attorney at law is one generally settled by local legislation or rules of court. The right of women to practice law has, however, received the attention of the Supreme Court of the United States.

Mrs. Myra Bradwell, residing in the State of Illinois, made application to the judges of the Supreme Court of that State for a license to practice law. So far as the record showed, her only disqualification was her sex. The statute of Illinois on the subject of admission to the bar enacted that no person should be permitted to practice as an attorney or counsellor at law, etc., without having previously obtained a license for that purpose from two of the justices of the Supreme Court, which license should constitute the person receiving the same as an attorney or counsellor at law, and should authorize him to appear in all the courts of record within the State, and there to practice as an attorney and counsellor at law according to the laws and customs thereof. On Mrs. Bradwell's application first coming before the Illinois court, the license was refused; and it was stated as a sufficient reason that in Illinois the applicant, "as a married woman, would be bound neither by her express contracts, nor by those implied contracts which it is the policy of the law to create between attorney and client." The fact of her coverture was admitted. The matter was reheard in the Illinois court, and the application again denied. It was considered as settled, in Illinois, that a married woman was not bound by contracts having no relation to her own property.¹

In all other respects than those already mentioned, the Illinois court considered it left to their discretion to establish rules by which admission to the office of attorney should be determined, provided that the court should establish such terms of admission as would promote the proper administration of justice, and that it should not admit any person, or class of persons, not intended by the legislature to be admitted, even though their exclusion was not expressly required by the statute. The opinion of the

¹ In *re Bradwell*, 55 Ill. 535; *Carpenter v. Mitchell*, 50 Ill. 470; *Conway v. Smith*, 13 Wis. 125.

State court rested upon the latter ground—the intention of the legislature as a basis—and the general usage of courts from time immemorial was invoked in ascertaining the legislative intent. The application was denied, and the legislature referred to as the proper source of relief, by means of a change in the statute. It is to be observed that on the rehearing the opinion went beyond the mere disqualification of coverture, and decided that under the existing statutes no woman, married or single, was privileged to practice law in that State.

The State court having denied the application, Mrs. Bradwell carried the case to the Supreme Court of the United States.

Mr. Justice Miller delivered the opinion of the court. He stated that the plaintiff asserted her right to a license on the grounds, among others, that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the State of Illinois, entitled to any rights granted to citizens of the latter State; and also on the ground that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. The protection designed by the latter clause, it was thought, had no application to a citizen of the State whose laws are complained of. The court said: "We agree with counsel, that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these, and these alone, which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States, or of any State. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of the State; and as to Federal courts, it would relate to citizenship of the United States. * *

"The right to control and regulate the granting of license to practice law in the courts of a State, is one of those powers which are not transferred for its protection to the Federal Gov-

ernment, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.”¹ The action of the lower court was, therefore, held not to violate any provision of the Federal Constitution, nor the Fourteenth Amendment to that Constitution, the power of a State to prescribe qualifications for admission to the bar of its own courts being unaffected thereby. The judgment of the lower court was affirmed.

Justices Bradley, Swayne, and Field concurred in the judgment, but not in the reasoning of the opinion.

“The claim,” said Mr. Justice Bradley, “that under the Fourteenth Amendment, which declares that no State shall make or enforce any laws which shall abridge the privileges and immunities of citizens of the United States, the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood, (the practice of law included) assumes that it is one of the privileges and immunities of women, as citizens, to engage in any and every profession, occupation, or employment in civil life. It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of men and women. * * * In the nature of things, it is not every citizen, of every age, sex, and condition, that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations, founded on nature, reason, and experience, for the due admission of qualified persons to professions and callings demanding special skill and confidence.”²

¹ *Bradwell v. The State*, 16 Wall. 130; *Slaughter-house Cases*, 16 Wall. 36.

² Chase, C. J., dissented from the judgment of the court, and all the opinions.

Afterward, a statute was passed in Illinois which permitted women to be licensed to practice; and by statute, or decisions of courts, they may be admitted in several of the other States.

The Court of Claims has decided that, under the Constitution and laws of the United States, a court of the United States is without power to admit a woman to the bar; and a woman is without legal capacity to take the office of attorney. A woman, therefore, cannot be permitted to practice in the Court of Claims.

§ 41. **Taxation of the profession.**—As the State has a right to tax occupations, a revenue act requiring a lawyer to pay a revenue license, entitling him to practice his profession within the State, has been held constitutional, and this on the ground that the right to tax is an incident of sovereignty, and co-extensive with it. All subjects over which the sovereign power of a State extends are objects of taxation. And the private revenue of individuals arises ultimately from three different sources—rent, profit, and wages; and every public tax must be finally paid from some one, or all, of these different sources of revenue. Neither is the tax open to the constitutional objection that it is not equal and uniform, if it is so upon all attorneys as a class. The State having authorized the issuance of a license to an attorney, is not thereby precluded from taxing such party annually for pursuing the profession within the State.¹

(In re Belva A. Lockwood, 9 Nott & H. 346. See In re Lavinia Goodell, 39 Wis. 232.)

In North Carolina, an unnaturalized foreigner cannot be licensed as an attorney. (Ex parte Thompson, 3 Hawks, 355.)

¹ Jones v. Page, 44 Ala. 657; Stewart v. Potts, 49 Miss. 749; McCulloch v. Maryland, 4 Wheat. 316; Weston v. Council, 2 Peters, 449; Brown v. Maryland, 12 Wheat. 419; Smith's Wealth of Nations, B. 5, chap. 2, p. 2; State v. King, 21 La. An. 201; State v. Waffles, 12 La. An. 243; Mayor v. Yuille, 3 Ala. 137; Cousins v. State, 50 Ala. 113; State v. Gazlay, 5 Ohio, 14; Goldthwaite v. Council, 50 Ala. 486; Case v. Mayor, 30 Ala. 538.

CHAPTER III.

ADMISSION TO PRACTICE.

- § 42. Admission.
- § 43. Admission and permission to practice essential.
- § 44. Old regulations as to admission and practice in England.
- § 45. The articulated clerks of England—Persons contracting.
 - § 46. Service under the articles.
 - § 47. Continuous service.
 - § 48. Holding other offices.
 - § 49. Service under partners.
 - § 50. Affidavit necessary.
 - § 51. Assignment and discharge of articles.
 - § 52. Disputes between clerk and master.
- § 53. The application and admission to practice under the English system.
- § 54. Examination and admission of attorneys under the English system.
 - § 55. The certificate.
 - § 56. Registration of names.
 - § 57. Practicing in the names of each other.
 - § 58. Effect of want of qualification.
- § 59. Readmission.
- § 60. Statutory regulations in England.
- § 61. Solicitors under the Supreme Court of Judicature Acts.
- § 62. Colonial Attorneys Relief Act, 1874.
- § 63. Statutory regulations in Ireland.
- § 64. Statutory regulations in Scotland.
- § 65. Statutory regulations and rules in the United States.
- § 66. In the United States Supreme Court.
- § 67. In Alabama.
- § 68. In Arizona Territory.
- § 69. In Arkansas.
- § 70. In California.
- § 71. In Dakota Territory.
- § 72. In Illinois.
- § 73. In Iowa.
- § 74. In Nevada.
- § 75. In New York.
- § 76. In Pennsylvania.

§ 42. Admission.—A consideration of the admission of the attorney to the bar introduces us to a subject governed, to a great extent, by statute and rules of court. The general rules and general features running through all the regulations will be considered, and afterwards some of the statutory and other

rules obtaining in England and a few of the representative States and Territories of the American Union will be glanced at, and references made to other similar statutes in other States.¹

The qualifications of the attorney and the nature of his office having been treated of, the next inquiry is as to how he may obtain admission to the bar, and thus become introduced to the privileges and responsibilities of his profession.

§ 43. Admission and permission to practice are essential.—The office of attorney at law is public so far as concerns the necessity of a license of some kind for its exercise, and the duty imposed upon the attorney of subserving the interests of public justice in the mode pointed out by his oath for admission.² Due admission to practice, according to the *lex fori*, is essential to enable a person to practice either as attorney, solicitor, or counsel in a particular court.³ In the admission of attorneys the courts are said to act judicially. The function is held not to be of an executive character, neither is it ministerial.⁴

A citizen of one State is not entitled, as of right, to admission to the bar of another State. The term "any male citizen," used in the statutes in regard to the admission of attorneys, has been construed to mean a citizen of the State.⁵ Nor can the legislature pass an act allowing such admission, and take the power of examination and passing upon the qualifications of an applicant away from the court, and confer it upon non-residents.⁶

The fact of an attorney not being admitted to practice is not a cause for dissolving an injunction, and dismissal of the bill. If plaintiff is present to attend, he need not have counsel. The

¹ The provisions of the statutes of older States, being incorporated with additions in those of newer States and Territories, the latter have sometimes been selected as illustrations instead of the former.

² *Waters v. Whittemore*, 22 Barb. 505; *Austin's Case*, 5 Rawle, 191; *Byrne v. Stewart*, 3 Dessaus. Eq. 466; *Wharton on Agency*, sec. 557.

³ *Ex parte Collins*, 2 Va. Cas. 222; *Wharton on Agency*, sec. 557; *Hobby v. Smith*, 1 Cowen, 588; *Seymour v. Ellison*, 2 Cowen, 13; *Robb v. Smith*, 4 Ill. 46; *Hallowell's Case*, 3 Dall. 410; *State v. Garesche*, 36 Mo. 256; *Champion v. State*, 3 Cold. 111; *McKoan v. Devries*, 3 Barb. 196; *Ex parte Hunter*, 2 W. Va. 122; *Thorn v. Lawson*, 6 Tex. 240; *Rader v. Snyder*, 3 W. Va. 414. See *Ex parte Tenney*, 2 Duval, 351; *Harrington v. Edwards*, 17 Wis. 586.

⁴ *In re Brackenridge*, 1 Serg. & R. 187.

⁵ *In re Henry & Snyder*, 40 N. Y. 560.

⁶ *In re Mosness*, 39 Wis. 509.

attorney himself, however, may be punished.¹ A client is not bound to ascertain whether a party, ostensibly acting as attorney, whom he employs in that capacity, is duly qualified. And proceedings taken by practitioners whose qualifications are defective are held to be neither void nor perhaps irregular on that account, so far as the proceedings are concerned.²

§ 44. Old regulations as to admission and practice in England.—Most of the old English statutory enactments as to attorneys were repealed or superseded by the 2 Geo. II, chap. 23, and this in turn has been remodeled, and many of its provisions merged in subsequent enactments. Some of the old provisions have been incorporated in these subsequent enactments, and others have become obsolete. It may be interesting, however, if not instructive, to refer to a few of these ancient regulations.

By the 15 Edw. II, stat. 1, the barons of the exchequer were restrained from admitting attorneys, except in pleas before them, and prohibited their clerks and servants from admitting attorneys, reserving to the chancellor and chief justices power to admit attorneys according to their discretion.

The Statute 4 Hen. IV, chap 18,³ enacted that attorneys should be examined by the justices, and, by their discretion, their names put in the roll; “and they that be good and virtuous, and of good fame, shall be received and sworn well and truly to serve in their offices, and especially that they make no suit in a foreign country; and the other attorneys shall be put out by the discretion of the said justices, and that their masters for whom they were attorneys be warned to take others into their places, so that, in the meantime, no damage nor prejudice come to their said masters. And if any one of the said attorneys do die, or do cease, the justices shall make another in his place, which is a virtuous man and learned, and sworn in the same manner as afore is said; and if any such attorney be

¹ *Peterson v. Parriott*, 4 W. Va. 42; *Rader v. Snyder*, 3 W. Va. 413.

² *Hilleary v. Hungate*, 3 Dowl. 62; *Smith v. Wilson*, 1 Dowl. 545; *Anon v. Sexton*, *Ibid.* 180; *Glynn v. Hutchinson*, 3 Dowl. 529; *Harding v. Parkess*, 2 Marsh. 228; *Welch v. Pribble*, 1 Dowl. & R. 215; *Reader v. Bloom*, 3 Bing. 9; 10 Moore, 261.

³ 2 Reeve's Hist. Eng. Law, chap. 18.

found in any default of record or otherwise, he shall forswear the court, and never after be received to make any suit in the court of the king." This was also to be observed in the exchequer at the discretion of the treasurer and barons.

The 3 Jac. I, chap. 7, enacted that attorneys or solicitors delaying their clients' suits for gain, or making false charges, "shall be liable to costs and treble damages in an action, and be discharged from being an attorney or solicitor any more; and to avoid the infinite numbers of solicitors and attorneys, none shall be admitted but such as have been brought up in the said courts, or otherwise well practiced in soliciting of causes, and have been found by their dealings to be skillful and of honest disposition, and that none be suffered to solicit causes in any of the courts aforesaid, but only such as are known to be men of sufficient and honest disposition."

The 33 Hen. VI, chap. 7, recited the great increase of attorneys in Norfolk and Suffolk; enacted that there should be but six attorneys in Norfolk, six in Suffolk, and two in Norwich, to be admitted by the two chief justices. Offenders were to forfeit £20. By rule of Mich. 1654, (K. B. and C. P.) it was ordered that a jury of able and credible officers, clerks, and attorneys should, once in three years, inquire concerning the offenses of attorneys; and that the court, once in every year, at Michaelmas, should nominate "twelve, or more, able practicers" to examine such as should desire to be admitted attorneys, and to inform the court of breaches of orders.

Under the rules of the Court of King's Bench, in 1654, none was to be admitted an attorney unless he had practiced five years, or served five years as clerk to some judge, serjeant at law, counsellor, attorney, or officer of one of the courts at Westminster, unless his master died or gave over practice; and also unless, upon examination, he was found of good ability and honesty for such employment; and that sufficient proof (to be put into writing) was made of such service to the prothonotary upon a desire of admittance, and filed with the clerk of the warrants, without fee. Attorneys dismissed by one court from their practice, for misdemeanors, were not (after certificate) to be admitted to practice in another court, it being contrary to the intent of the law.

Various rules were promulgated in the courts of King's Bench and Common Pleas, in the years 1457, 1564, 1573, 1582, 1616, 1615, 1645, 1654, 1656, 1632, 1682, 1662, 1669, 1705, regulating the attendance upon the court, practicing without leave, payment of fees, the number of attorneys allowed to practice, the appearance and change of attorneys, the retainer and licenses of attorneys, etc.

Formerly an attorney of the Court of King's Bench could not practice in the Court of Common Pleas, nor *vice versa*. No one could practice as an attorney in any of the courts but such as were admitted and sworn as an attorney of that particular court. But afterward, by the Statute 6 and 7 Vict., chap. 73, sec. 27, attorneys admitted of any one of the superior courts might practice in any other superior court, or in any inferior court of law in England and Wales, upon signing the roll of such other court. To practice in the Court of Chancery, it was still necessary to be admitted a solicitor therein.

The Statute 6 and 7 Vict., chap. 73, consolidating and amending several of the laws relating to attorneys and solicitors, prescribes the conditions of admission as an attorney, the time and mode of their service under articles, and the oaths to be administered to them; and authorizes the judges of the courts of common law, and the master of the rolls, to appoint examiners, to examine the fitness and capacity of all persons applying to be admitted as attorneys or solicitors; and the certificate, either of the common law or equity examiners, will be sufficient to entitle a person so examined to admission in all the courts, examination by both not being necessary.

§ 45. Articled clerks in England—Persons contracting.

—In England, the first step requisite to a person becoming an attorney has been to enter into an agreement, usually called articles of clerkship, with a person properly qualified under the statutes to take articled clerks for the purpose of becoming attorneys or solicitors. The attorneys or solicitors properly qualified to receive clerks must be actually practicing, or else the masters must be certain other specified officers of the various

courts.¹ The binding of the clerk to his master must be *bona fide*, and he must be under the entire control of the master the whole of the time mentioned in the articles.² The person articulated must be of a proper age, or his name will be erased from the roll of clerks in court.³

By the Statute 6 and 7 Vict. chap. 73, sec. 3, no person is capable of being admitted and enrolled as an attorney or solicitor, unless he has been bound by contract in writing to serve as a clerk for and during the term of five years to a practicing attorney or solicitor in England or Wales, duly sworn and admitted, and has duly served under such contract for the term of five years. A person bound for five years may serve part of that time, not exceeding a year, as pupil, either with a practicing barrister or a certificated special pleader, or the London agent of the attorney or solicitor.⁴

No attorney or solicitor can have more than two clerks at the same time, or take or retain a clerk after discontinuing practice, nor while he is retained as a writer or clerk by any other attorney or solicitor; and service under such circumstances is not included in the computation of time, nor considered as good service.⁵ By the 23 and 24 Vict., chap. 127, sec. 4, persons having been *bona fide* clerks to attorneys and solicitors for ten years, may be admitted after three years' service.⁶

Under the old English rule, service under articles to an attorney by a barrister was not available for the purpose of his being admitted an attorney; ⁷ but by 23 and 24 Vict., chap. 127, sec. 3, persons, having been barristers, may be admitted as attorneys after three years' service to attorneys or solicitors in practice. Persons who hold government positions are not competent to

¹ See the early statute: 22 Geo. II, chap. 46, secs. 7, 19; 2 Geo. II, chap. 23, sec. 15; Reg. Trin. 31 George III, K. B. & C. P.

² Ex parte Taylor, 4 Barn. & C. 341; Fraser's Case, 1 Burr. 291.

³ In re Donne, 3 Swanst. 96.

⁴ 6 and 7 Vict. chap. 73, secs. 3, 6. The 1 and 2 Geo. IV, chap. 48, and 1 Vict. chap. 56, repealed, were of similar purport; 6 and 7 Vict. chap. 73, sec. 4; 3 Stewt. Blackst. 29. See also 2 Geo. II, chap. 23, secs. 5, 7; 12 Ibid. chap. 13, sec. 3; 22 Ibid. chap. 46, sec. 2; 30 Ibid. chap. 19, sec. 75.

⁵ R. Trin. 31 Geo. III, K. B. and C. P. This rule has been held retrospective in its operation, it being merely confirmatory of an old regulation. (4 Durn. & E. 492.)

⁶ See In re Sherry, 3 Law R. Q. B. 164.

⁷ In re Bateman, 2 Dowl. & L. 725; 6 Q. B. 583; 9 Jur. 132; 14 Law J. Q. B. 89.

enter into a contract of service as articled clerks. Where a person so situated was articled to an attorney, and nominally served him for five years, retaining his position under the government during the entire period, and then commenced practicing as an attorney, the court ordered his name to be stricken from the rolls.¹ It follows that the service must be *bona fide*; and accordingly, where an attorney, by mere collusion, and with intent to secure the business arising from the prisoners, took one of the turnkeys of the King's Bench Prison for his articled clerk, the articles were canceled in court.² To be admitted, a clerk must actually serve the full time under the articles; any interregnum must be supplied by service under new articles.³ The clerk must also be under the complete control of his master for the full term. Any other absorbing occupation, like accepting a busy official position, may prevent his admission, or, being admitted, lead to the striking of his name from the rolls.⁴ This rule has been laid down with much strictness and apparent hardship; the devoting of days, or even hours, to a government employment, although only an hour or so per day, being held to disqualify the clerk.

§ 46. Service under the articles.—The articled clerk must, during the whole time and term of service specified in the contract, continue and be actually employed in the proper business, practice, and employment of an attorney or solicitor. An affidavit of due service is required of him before admission.⁵ But no person who has regularly served his clerkship is prevented or disqualified from being admitted, by reason of his master having omitted or neglected to take out his annual certificate, or to enter or register it.⁶

The time of service is computed from the date of the execution of the articles, and not from their date; and the clerk can-

¹ In *re Taylor*, 6 Dowl. & R. 428; 4 Barn. & C. 341. The same prohibition is now incorporated in the Statute 23 and 24 Vict. chap. 127, sec. 10.

² *Fraser's Case*, 1 Barr. 291.

³ *Ex parte Smith*, 1 Dowl. & R. 14.

⁴ *Ex parte Rowle*, 2 Chit. 61; *Ex parte Taylor*, 5 Barn. & Ald. 341; 4 Barn. & C. 341; 6 Dowl. & R. 348. See *Ex parte Paige*, 1 Bing. 160; 7 Moore, 572.

⁵ 6 and 7 Vict. chap. 73, secs. 12, 14; 2 Geo. II, chap. 23, sec. 5; 22 *Ibid.* chap. 46, sec. 8.

⁶ *Ibid.*

not be admitted till he has served five years from the former date.¹ A clerk (being a master of arts) was articled on the 8th of May, 1858, for three years "from the date thereof." It was held that such service was not completed until after the 8th of May, 1861.²

In deciding whether the service of an articled clerk has been sufficiently subject to the supervision of the master, the courts are governed by the circumstances of each particular case.³ The statute does not seem to be complied with by the clerk serving part of the time with another attorney, even with his master's consent, and the residue of the time with his master;⁴ nor with the partner of a deceased master.⁵ But an articled clerk, performing all his master's business, may at leisure hours work for wages with another attorney.⁶ If the clerk be absent, with his master's consent, a portion of the allotted time, he must serve for that length of time in addition, and can then be admitted.⁷ But in one case, where the time of absence was spent in a law school in the United States, and the voyage thither was taken by medical advice, and with the consent of the master, the clerk was allowed to be examined for admission, and the time of absence included.⁸

¹ Ex parte Angel, 4 Jur. 656.

² Anon. 9 W. R. 639.

³ In re Duncan, 5 Best & Smith, 341; 10 Jur. N. S. 939; 33 L. J. Q. B. 190; 12 Week. R. 752; 10 L. J. N. S. 337.

⁴ In re Taylor, 4 Barn. & C. 341; 6 Dowl. & R. 428; Ex parte Hill, 7 T. R. 456.

⁵ Ex parte Dalton, 9 D. P. C. 110; 4 Jur. 1187.

⁶ Ex parte Blunt, 2 W. Black. 764; Ex parte Hill, *supra*; Llewellyn, Ex parte, 2 Dowl. N. S. 701; 7 Jur. 377; 12 Law J. Q. B. 138. See Ex parte Carr, 3 Q. B. 447.

⁷ Ex parte Hubbard, 1 D. P. C. 438; S. P. Ex parte Frost, 3 D. P. C. 322; 1 Har. & W. 111.

⁸ Ex parte Cross, 2 Dowl. N. S. 692; 7 Jur. 67; 12 Law J. Q. B. 138. See Ex parte Earle, 17 Jur. 440; 1 B. C. C. 180. See, as to effect of assignment of articles, Ex parte Brutton, 18 Jur. 580; 23 Law J. Q. B. 290. See generally, as to effect of assignment, absence, and time of service, Ex parte Wallis, 8 Jur. N. S. 913; 2 Best & Smith, 416; 31 Law J. Q. B. 176; 6 L. T. N. S. 242; In re Hayward, 11 Week. R. 67; Ex parte Smith, 5 Jur. N. S. 515; 28 Law J. Q. B. 263; 7 Week. R. 451; 32 L. T. 135; 1 El. & E. 928; Ex parte Kedde, 4 Best & Smith, 993; 11 Jur. N. S. 503; 34 Law J. Q. B. 136; 13 Week. R. 290; 11 L. T. N. S. 625; In re Thomas, 11 Week. R. 341. As to effect of illness, see Anon. 9 L. T. N. S. 324; Ex parte Beddock, 13 Week. R. 871; 12 L. T. N. S. 711; Ex parte Matthews, 1 Barn. & Adol. 160; Ex parte De Fivas, 4 B. & S. 992; 11 Jur. N. S. 13; 34 Law. J. Q. B. 7; Ex parte Rogers, 11 Jur. N. S. 504; 34 Law. J. Q. B. 136; Ex parte Vaughan, W. W. & D. 46; 1 Jur. 21.

In case of death of the master, or his discontinuance of practice, or if the contract is canceled by mutual consent, or the clerk legally discharged by order of court, and he shall become bound by another contract, the time during which he served *bona fide* under the first articles shall be good and available *pro tanto* in estimating the requisite time under the second contract.¹

By the 23 and 24 Vict., chap. 127, sec. 2, (repealing sec. 7 of the 6 and 7 Vict., chap. 73) a person having taken the degree of bachelor of arts or of laws, at the Oxford, Cambridge, Dublin, Durham, or London universities, or in the Queen's University, in Ireland; or the degree of bachelor of arts, master of arts, bachelor or doctor of laws in any of the universities in Scotland, not being honorary, may be admitted after three years' service, instead of five. Under former statutes it was held that he must have taken his degree before being bound by articles.² By the same 23 and 24 Vict., persons who have successfully passed examinations at the universities may be admitted and enrolled, after having duly served under articles for the term of four years, under regulations made by the judges.³

§ 47. Continuous service.—A clerk was articulated to his father, who was an attorney, for five years, and he served part of the time, when the father assigned all the service he had in the clerk to another attorney for fifteen months; and the clerk served for that time, and then returned to his father, and served under the original articles for the remainder of the five years. The court held that the service under the second attorney could not be reckoned as part of the five years' service required by the

¹ 6 and 7 Vict. chap. 73, sec. 13. See 2 Geo. II, chap. 23, sec. 12; 22 Geo. II, chap. 46, sec. 9; chap. 14, sec. 17.

² Ex parte Bradford, 1 El. & E. 417; 5 Jur. N. S. 648; 28 Law J. Q. B. 138; 7 Week. R. 188; 32 L. T. 254. See Ex parte Unthank, 2 Moore & P. 453; Ex parte Gardner, 8 L. T. N. S. 315. See old statutes, 1 and 2 Geo. IV, chap. 48; 3 Geo. IV, chap. 16; 7 Geo. IV, chap. 5.

³ See as to rules and regulations for the examination of articulated clerks, under the 23 and 24 Vict. chap. 127; Reg. Gen. July 26th, 1861; 7 Jur. N. S. 309, 310, part 2; Reg. Gen. Nov. 26th, 1861; 8 Jur. N. S. 5, part 2. See as to service of managing clerks: 23 and 24 Vict. chap. 127, sec. 4; Ex parte Vosper, 4 Best & Smith, 901; 10 Jur. N. S. 724; 33 Law J. Q. B. 113; 12 Week. R. 374; Ex parte Rigby, 11 L. T. N. S. 671.

6 and 7 Vict., chap. 73, secs. 6, 12, as a service with another, even with the master's consent, is not sufficient.¹

So a service has been held insufficient, if continuous for the whole time, but under two distinct contracts of service.²

A clerk was articulated for five years, and served part of the time, when, owing to illness, and under medical advice, he went on a sea voyage, was gone eleven months, and then returned and resumed his service for the remainder of the five years. He then applied for admission, but the court refused it, holding that the eleven months of absence could not be counted as service, as he had not been actually employed as an attorney during five years, under the 6th and 7th Vict., chap. 73, sec. 12.³

§ 48. Holding another office.—Employment as steward of a manor has been held not a violation of the statute,⁴ the duties having been performed by a deputy, with whom the clerk divided the fees, and the clerk having thrice only during two or three years, and with his principal's consent, absented himself for a day in order to hold court.⁵

But where an articulated clerk held during the term of his articles the office of vestry clerk, and it was shown that the duties of the office had not interfered with the due performance of his duties under his articles, or with his legal studies, still he was said to have contravened the provisions of the 23 and 24 Vict., chap. 127, sec. 10, by holding another office, and his application for admission was denied.⁶

§ 49. Service under partners.—The practice had been to bind the clerk to one partner only of a firm.

An attorney can have but two clerks articulated to him during the same period; and, therefore, if he has a partner, and a clerk

¹ *Ex parte Adams*, 10 Law R. Q. B. 227: approving *Ex parte Hill*, 7 T. R. 456; under the old statute, 2 Geo. 12, chap 23; and distinguishing the case from *Ex parte Brutton*, 23 L. J. Q. B. 290, and *Ex parte Trenchard*, 9 Law R. Q. B. 406.

² *Ex parte Austin*, 21 Week. R. 390; *Ex parte Adams*, 10 Law R. Q. B. 227.

³ *Ex parte Moses*, 9 Law R. Q. B. 1. See as to service under old articles. cancellation by mutual consent, *Ex parte Trenchard*, 9 Law R. Q. B. 406.

⁴ 23 and 24 Vict. chap. 127, sec. 10; 6 and 7 Vict. chap. 73.

⁵ *In re Peppercorn*, 1 Law R. Com. P. 473. See *In re Taylor*, 4 Barn. & C. 341.

⁶ *In re Greville*, 9 Law R. Com. P. 13; distinguishing the case from *In re Peppercorn*, *supra*, the doctrine of which the court said would not be extended.

is articulated to both members of the firm, the number of articulated clerks which the firm may take would necessarily be diminished. Hence, the practice of binding the clerk to one master only. But the case of *Ex parte Bayley*¹ certainly seems to countenance a binding to two attorneys. Nevertheless, there are inconveniences which might result to them if the clerk were articulated to the firm, and also possible inconvenience to the clerk, if the partnership were dissolved, for he could not serve two masters. But if the applicant chooses to be bound to both partners, he may take the risk; a binding to both is a binding to each, and is not contrary to the act; and if the parties choose to adopt that form of engagement, knowing the consequences that may result, they are at liberty to do so.²

§ 50. Affidavit necessary.—The attorney to whom the clerk is bound must, within six months after the date of the contract, make or cause to be made, and sworn to, an affidavit of the attorney's having been duly admitted, and of the actual execution of the contract by the attorney and clerk. This affidavit must be filed within six months next after the execution of the contract.³

§ 51. Assignment and discharge.—By 6 and 7 Vict., chap. 73, sec. 5, if an attorney or solicitor, before the end or determination of the contract, becomes bankrupt, or is imprisoned for debt, and remains in prison for the space of twenty-one days, the court wherein he is admitted, upon the application of the clerk, may order and direct the contract to be discharged, or assigned to such person, upon such terms and in such manner as the court may think fit. And so upon the death of the attorney, or if he discontinues practice, or if the contract is canceled by mutual consent, or the clerk is legally discharged before the expiration of the term by any rule or order of the court, the clerk may be bound by another contract to any other practicing attorney or solicitor during the residue of the term, and service under this contract will be deemed good and effectual service, provided

¹ 9 Barn. & C. 691.

² *In re Holland*, 7 Law R. Q. B. 297.

³ 6 and 7 Vict. chap. 73, sec. 8.

an affidavit is made and filed of the contract and its execution, as in the case of a first or an original contract.¹

If the master absconds, or is guilty of a felony, the clerk may obtain a discharge from his articles, and further articles may be enrolled without an assignment of the original articles. The service of the rule in some way is sometimes ordered, but in cases of felony the court will generally grant a rule absolute in the first instance to discharge the clerk from his articles.²

Similar orders will be made in cases where the attorney becomes insane, or dies intestate; and in a case where an articled clerk, under age, obtained a position abroad, and his father, as well as the attorney, joined with him in an application to vacate the articles, the court granted the motion.³

In case of the dissolution, for any reason, of the relation between the articled clerk and his master, it seems to be at the discretion of the court whether or not an order will be made for the return of any part of the premium paid to the attorney for taking the articled clerk. The course pursued has varied with the circumstances of each particular case.⁴

§ 52. Disputes between the clerk and the master.—The courts in England appear to have exercised a very summary

¹ 6 and 7 Vict. chap. 73, secs. 5, 13.

² *Ex parte Cartley*, 12 Law J. Q. B. 98; *Ex parte Hancock*, 2 Dowl. N. S. 54; 6 Jur. 949; *Ex parte Cartmel*, 6 Jur. 950. See *Ex parte Carnley*, 2 Dowl. N. S. 945; 7 Jur. 767.

³ *Anon.* 3 Jur. 652; *Ex parte Lewis*, 2 Dowl. & L. 130; 8 Jur. 539; 13 L. J. Q. B. 261; *Ex parte Allen*, 8 Jur. 1169; *Ex parte Darbell*, 6 D. P. C. 505; 1 W. W. & H. 174. See as to making and filing affidavit of due execution of the articles, and the enrollment and registration thereof: 6 and 7 Vict. chap. 73, secs. 8, 9, 13; *Ibid*, chap. 86, secs. 1, 2, 3; 23 and 24 Vict. chap. 127, sec. 7; *Ex parte Heming*, 9 Jur. 900; *In re Harris*, 11 Week. R. 36; *In re Follett*, 30 Beav. 629; *Ex parte Legett*, 3 Jur. N. S. 1219; *Ex parte Lee*, 8 Week. R. 541; *Anon.* 27 Law J. Q. B. 184; *Ex parte Cunningham*, 9 Jur. 109; 8 Jur. 405; *In re Benson*, 10 Beav. 435; *De Faur v. Sigel*, 4 DeGex, M. & G. 20. When articles are lost or stolen, see 2 and 3 Vict. chap. 33, sec. 9; *Ex parte Chapman*, 3 D. P. C. 562; *Ex parte Beckenden*, 1 Har. & W. 193; *Ex parte Clark*, 3 Barn. & Ald. 610; *Ex parte Nash*, 6 Scott N. R. 695; *Ex parte Briggs*, 1 Dowl. & L. 94.

⁴ *Ex parte Gardner*, 2 D. P. C. 520. See *Ex parte Frankerd*, 3 B. & A. 257; *Ex parte Bayley*, 9 Barn. & C. 691; *Ex parte Haden*, 1 W. W. & H. 321; 2 Jur. 873; *Ex parte Bennett*, W. W. & D. 210; *Ex parte Thompson*, 1 Ex. 864; *Hirst v. Tolson*, 2 Macn. & G. 134; 2 Hall & T. 359; 14 Jur. 559; 19 L. J. Ch. 441; *Lee v. Page*, 7 Jur. N. S. 768; 30 L. T. Ch. 857; 9 Week. R. 754; *Craven v. Stubbins*, 10 Jur. N. S. 1189; 34 L. J. Ch. 126; 13 Week. R. 208; 11 L. T. 402.

jurisdiction over disputes and matters of difference arising between the clerk and his master, especially in all cases of misconduct on the part of the clerk. Thus, a court refused to compel an attorney to execute an assignment of articles of clerkship where the clerk had been guilty of criminal conversation with the attorney's wife.¹ If the master refuses to deliver up the articles after the clerk has served his full term, the court will compel their delivery.²

§ 53. The application and admission to practice under old English rules.—Under a rule of the Court of King's Bench, in the time of George III, every applicant for admission as an attorney in that court, and who had not been admitted to any other court, was required, for the space of one full term previous to the term in which he intended to apply for admission, to cause his name and place of abode, and also the names and residences of the attorneys to whom he was articulated, to be fixed on the outside of the Court of King's Bench, in the place appropriated for public notices, and also in some conspicuous place in the chambers of each of the judges of the court, and in the King's Bench office. No person failing to comply with this order was allowed to be admitted. Similar notices were required in the Court of Common Pleas; but the Court of King's Bench, by a subsequent rule, ordered that, instead of posting the names and residences in each of the judge's chambers, they should be entered in a book kept for that purpose at each of the judge's chambers of *that* court.³

In the Common Pleas, the application was to be made before the last week in the term, and every person not being an attorney of the Court of King's Bench, or solicitor in the Court of Chancery or Court of Exchequer, was required, before being sworn, to file articles of clerkship, together with the affidavit of the due execution thereof, and the affidavit of due service under the articles, and of the notices having been given pursuant to rule. The notice was required to be given for the term immediately

¹ Ex parte Briggs, 1 Tidd's Pr. 68; Ex parte Frankerd, 3 Barn. & Ald. 257; 1 Chit. 694, 558; 2 Chit. 52; Copes v. Hutton, 2 Russ. 357.

² 2 Russ. 358.

³ Reg. T. T. 31 Geo. III; Ibid. 31 and 33 Geo. III, K. B. & C. P.

preceding the term in which application was made for admission. Where an attorney's clerk has served part of his time with one attorney and part with another, to whom the articles are assigned, the name of the assignee must be inserted in the notice of intention to apply for admission.¹

As to examination for admission, the judges of the respective courts, or one or more of them, were, by the 34 Geo. III, chap. 14, sec. 3, required, before allowing any person to take the oath or affirmation, to examine and inquire, by such ways and means as might appear suitable, into the fitness, capacity, and qualifications of the applicant, and, after being satisfied of these things, administer the oath in open court, and then cause him to be admitted, and his name to be enrolled.

§ 54. Examination and admission of attorneys under the English system.—The candidate for admission in England is now required to give notice to the examiners before the commencement of the term next preceding that in which he proposes to be examined, of his intention to apply for examination. Three days, at least, before the commencement of the term next preceding that in which any person shall propose to be admitted an attorney of any of the courts, he must cause to be delivered at the master's office a written notice, which must state his place or places of abode or service for the last preceding twelve months, and the name and place of abode of the attorney or attorneys to whom he was articulated and assigned (if any assignment was made); and the master is required to post the notice on the first day of the term in some conspicuous place, within or near to and on the outside of each court; and the applicant is also required, for the space of one full term previous to the term in which he shall apply to be admitted, to enter, or cause to be entered, in two books kept for that purpose, one at the chambers of the lord chief justice or chief baron of the court in which he applies to be admitted, and the other at the chambers of the other judges or barons of such court, his own name and

¹ R. M. 2 Geo. II, C. P.; R. T. 37 Geo. III, C. P.; 1 Bos. & P. 90; Ex parte Bonner, 2 Marsh. 48; 6 Taunt. 335; Ex parte Stokes, 1 Chit. 556.

place of abode, and those of the attorney to whom he has been articulated and assigned, if any assignment has been made.¹

Three days' notice must be given to the master, exclusive of the day on which the notice is given, and of the first day of the term to which it relates. Sunday will be counted as one day.² Slight discrepancies in names of the parties and residences will not invalidate the notices, especially upon proof of identity.³ Slight irregularities, susceptible of amendment, are not fatal.⁴

The courts have exercised their discretion according to the circumstances of each particular case, in dispensing with the regular notices, and in accepting irregular ones.⁵

A printed copy of the list of admissions and re-admissions is required to be posted in the Queen's Bench, Common Pleas, and exchequer offices, and at the judges' hall or chambers of each court in Roll's Gardens.

The several masters for the time being for the courts of Queen's Bench, Exchequer, and Common Pleas, together with sixteen attorneys or solicitors, to be appointed by a rule of court, in every year, to be examiners for one year—any five of whom may act, there being at least one master among the five—are to conduct the examination, and be subject to appeal. No person who shall not have been previously admitted a solicitor of the High Court of Chancery shall be admitted to be sworn an attorney of any of the courts, except on production of a certificate signed by the major part of such examiners actually present at and conducting the examination, testifying to the fitness and capacity

¹ Reg. Gen. Hil. T. 16 Vict. 1853; 6 and 7 Vict. chap. 73, secs. 15, 16; 1 El. & B. App. 57. See *In re Lucas*, 2 Jur. N. S. 65, Q. B. As to admission of barristers through the inns of court, see Introduction, *ante*, sec. 15, *et seq.*

² *In re Prangley*, 4 Ad. & E. 781; 6 Nev. & M. 421; 2 Har. & W. 65; *Ex parte Bumps*, 5 D. P. C. 713; W. W. & D. 530. But see *Ex parte Blunt*, 5 D. P. C. 231; *Ex parte Bayley*, 6 D. P. C. 516; 1 W. W. & H. 175; 2 Jur. 326.

³ *Ex parte Croft*, 5 Nev. & M. 58; 1 Har. & W. 375; *Ex parte Dukes*, 7 D. P. C. 605; 2 W. W. & H. 44; *In re Clarke*, 4 Nev. & M. 709; 3 Ad. & E. 72; 1 Har. & W. 141; *Ex parte Collins*, 6 D. P. C. 495; 1 W. W. & H. 173; 2 Jur. 842; *Ex parte Jones*, 3 Ad. & E. 74; *In re Saffery*, 11 Week. R. 779.

⁴ Cases cited *supra*; *Ex parte Rowland*, 3 Jur. 1193; *Ex parte Lambert*, 3 Moore & P. 269. See *In re Tucker*, 9 D. P. C. 661; *Ex parte Woolwright*, 4 D. P. C. 274; 1 Har. & W. 517.

⁵ See *Ex parte Thompson*, 1 W. W. & H. 33; 2 Jur. 34; *Ex parte Gwynne*, 2 W. W. & H. 95; 3 Jur. 199; *Ex parte Hancock*, 4 Ad. & E. 779; 2 Har. & W. 99; *Ex parte Cunliffe*, 3 Dowl. & L. 548; 9 Jur. 942; 15 Law J. Q. B. 41; *Ex parte Estcourt*, 8 Jur. 985; *Ex parte Gutaris*, 7 Jur. 1039.

of the applicant to act as an attorney, and in the usual business transacted by an attorney; and such certificate to be in force only to the end of the term next but one following the date thereof, unless such time shall be specially extended by the order of a judge.¹ The examiners conduct the examinations under regulations first submitted to and approved by the judges.

The court has not power to extend the time during which the certificate of examination for admission to practice as an attorney shall be in force. The extension must be by order of a judge.² If the applicant fail to receive his certificate, he must give a fresh term's notice to the examiners if he intends to apply again to be examined.³ If any person is dissatisfied with the refusal of the examiners to grant a certificate, he is at liberty within one month to apply for admission by petition, in writing, to the judges, to be delivered to the clerk of the lord chief justice of the Court of Queen's Bench, upon which no fees or gratuity shall be received, and the application is to be heard by not less than three of the judges.⁴

A clerk under twenty-one cannot be examined.⁵ But where he has served the full period of five years, and will become of age a few days after the term, he may be examined for the purpose of being admitted the following term.⁶ The court has, where a clerk proposed to practice abroad only, allowed him to be examined before the expiration of his articles.⁷

¹ Reg. Gen. Q. B. C. P. & Ex. H. T.: 16 Vict. r. 1, 2; 1 El. & B. App. 58.

² Ex parte Young, 13 Q. B. 663; Ex parte Bromley, 2 Dowl. N. S. 388; 12 Law J. Q. B. 98; 6 Jur. 995.

³ Ex parte Henry, 1 Perry & D. 71; 8 Ad. & E. 745; 2 Jur. 920; 1 W. W. & H. 585.

⁴ Reg. 3, 1 El. & B. app. 59. See, as to depositing articles, and assignment, if any: Reg. Gen. *supra*, 1 El. & B. 58; Ex parte Buckle, 2 Dowl. N. S. 476; 7 Jur. 558; Ex parte Nichols, 2 Dowl. N. S. 423; Ex parte Cooper, 5 D. P. C. 703; W. W. & D. 348. As to sending answers to questions, see Reg. Gen. Q. B. C. P. & Ex. H. T. 16 Vict. r. 3; 1 El. & B. app. 61; Ex parte Lyons, 6 D. P. C. 517; 1 W. W. & H. 174; Ex parte Holland, 5 D. P. C. 681; W. W. & D. 349; 1 Jur. 432; Ex parte Carr, 1 Dowl. N. S. 565; 6 Jur. 194.

⁵ Ex parte Cragg, 6 D. P. C. 256; Ex parte Evans, 1 W. W. & H. 34; 2 Jur. 47.

⁶ Ex parte Tebbs, 9 D. P. C. 151; 1 W. P. C. 16; 4 Jur. 1014; Bonsfield, Ex parte, 9 D. P. C. 616; 5 Jur. 772.

⁷ Ex parte Twynam, 8 D. P. C. 293; Ex parte Fulcher, 8 D. P. C. 614; 4 Jur. 435; 3 Jur. 1124. See generally, as to examination, Ex parte Masterman, 6 Scott, 782; 7 D. P. C. 156; 5 Bing. N. C. 70; In re Smithers, 1 Arn. 423; In re Bebb, 3 Jur. 24; Ex parte Johnson, 1 W. W. & H. 404; 2 Jur. 966; Ex parte Tompkins, 6

An attorney may be admitted on taking the oath of allegiance, and the oath to demean himself truly and honestly, under 6 and 7 Vict., chap. 73, secs. 18, 19.¹ But he cannot practice in England without taking the oath substituted for the oaths of allegiance, supremacy, and abjuration, by 21 and 22 Vict., chap. 48, sec. 1. Attorneys of the superior courts are entitled to be admitted to inferior courts of law.² If the attorney, after admission, change his name, the court may allow the entry upon the rolls to be altered accordingly.³ If an attorney practice in a court in which he has not been admitted, he cannot maintain an action for his fees, nor for money out of pocket; nor has he any lien for his costs or for money disbursed upon a judgment recovered; nor can he prevent the damages and costs in one action being set off against those in another, even though his costs have not been paid.⁴

An indictment will lie against a person who acts as an attorney without being admitted and enrolled pursuant to 6 and 7 Vict., chap. 73, sec. 2, notwithstanding, by sec. 35, certain disabilities and penalties are imposed on a person so acting.⁵

D. P. C. 3; W. W. & D. 569; *Ex parte Thomas*, 8 Week. R. 522. See, as to expiration of period of clerkship, 23 and 24 Vict. chap. 127, sec. 12; *In re Ellis*, 5 L. T. N. S. 686; *In re Steele*, 10 Jur. N. S. 1254; 33 Law J. Q. B. 326; 12 Week. R. 956. See, as to examination, articles of clerkship, notices of examination, etc., *Ex parte Clerk*, 7 Law R. Q. B. 587; *Ex parte Stewart*, 7 Law R. Ex. 202; *Ex Parte Banyard*, 10 Law R. Com. P. 638; *Ex parte Sayer*, 10 Ibid. 569; *Ex parte Darville*, 2 Ibid. 244; *Ex parte Cumberland*, 10 Law R. Q. B. 138. As to taking out certificate: *Sparling v. Brereton*, 2 Law R. Eq. 64.

¹ *In re Comroodeen Tyabjee*, 1 El. & Bl. 319; 4 Jur. N. S. 1108; 28 Law J. Q. B.

² 6 and 7 Vict. chap. 73; *London v. Regor*, 13 Q. B. 1; 13 Jur. 33; 17 Law J. Q. B. Ex. 330. See, as to admitting attorneys of the inferior courts to the superior courts, 16 and 17 Vict. chap. 59, sec. 7; *In re Myers*, 8 Q. B. 515; 10 Jur. 563; 15 Law J. Q. B. 209; *Ex parte Patrick*, 7 Jur. 993; 13 Law J. Q. B. 90; *In re Watson*, 11 Week. R. 730; 6 Jur. N. S. 1077; 30 Law J. Q. B. 1; 9 Week. R. 13; 3 L. T. N. S. 267; *Ex parte Hogg*, 11 L. T. N. S. 598; 13 Week. R. 315.

³ *Ex parte Benthall*, 7 Scott N. R. 407; *Ex parte Gimlet*, 11 Week. R. 210; 7 L. T. N. S. 562; *Ex parte Daggett*, 1 Lown. M. & P. 1; *Ex parte Moses*, 15 Jur. 153; 19 Law J. Q. B. 345; *Ex parte James*, 9 Com. B. 221; 1 Lown. M. & P. 4; 5 Ex. 310; 19 Law J. Ex. 272; *Ex parte Dearden*, 5 Ex. 710; 1 Lown. M. & P. 666; 20 Law J. Ex. 80; *Anon.* 11 Week. R. 780. But see *Ex parte Hayward*, 5 Scott. 712.

⁴ *Latham v. Hyde*, 1 D. P. C. 594; 1 C. & M. 128; 3 Tyrw. 143.

⁵ *Reg v. Buchanan*, 8 Q. B. 883; 10 Jur. 736; 15 Law J. Q. B. 227. See *Ackroyd v. Gill*, 5 El. & B. 808; 2 Jur. N. S. 184; 25 Law J. Q. B. 111.

An exemplification of the record of admission is of sufficient dignity to call for a plea of *nil tibi record*, and the facts as to a person being an attorney cannot otherwise be questioned. (*Tidd's Pr.* 71.)

§ 55. The certificate.—Upon payment of the amount accrued since the expiration of the last certificate, or such further sum, by way of penalty, as the courts may direct, attorneys may be readmitted.¹ If the attorney has discontinued practice, after his last certificate expired, he may be admitted without payment of arrears, as the word “neglect” in the statute is held to mean culpable neglect, and does not apply to a person who has omitted to take out his certificate during the interval of his ceasing to practice.² The facts may be shown by affidavit.³

Even if a party continue to practice as a solicitor, after his certificate has expired, he may, under circumstances, and where the omission did not arise from culpable neglect, be readmitted. So where an attorney in the country had given to his clerk directions, and the necessary money to take out his certificate, and the clerk applied the money to his own use, and the applicant, supposing his certificate had been taken out, continued to practice, after his former certificate had expired, he was readmitted without fine; ⁴ but in a subsequent case, it was said that attorneys must be put upon inquiry, for the good of the profession; and the court laid down a rule that thereafter there should be no readmission without fine, or with a merely nominal one.⁵

Various statutes require the attorney, immediately after his admission, and annually thereafter, to take out an annual certificate, showing that certain duties, imposed by reason of his vocation, have been paid. For failure to do this, statutory penalties, and forfeitures, and disabilities are also imposed. (*Cross v. Kaye*, 6 Durn. & E. 663; *Ex parte Jones*, 4 Moore, 347; *Sabin v. De Burgh*, 2 Camp. 196; *Nixon v. Hewitt*, 10 Moore, 270; *Prior v. Moore*, 2 Maule & S. 605; *Welch v. Pribble*, 1 Dowl. & R. 215; 9 Geo. IV, chap. 49, sec. 9; 7 Geo. IV, chap. 44; 25 Geo. III, chap. 80; 37 *Ibid.* chap. 90, secs. 26, 30, 31; 36 *Ibid.* chap. 90, sec. 26; 54 *Ibid.* chap. 144; 55 *Ibid.* chap. 184; *Davis v. Edmonson*, 3 Bos. & P. 282; 4 Esp. 14; *Barnard v. Gostling*, 1 New Rep. 245; 2 East, 569.)

¹ 37 Geo. III, chap. 90, sec. 31.

² *Ex parte Matson*, 2 Dowl. & R. 238; *Ex parte Clarke*, 2 Barn. & Ald. 314; *Ex parte Scrope*, 2 Taunt. 398.

³ *Ex parte Cunningham*, 7 Moore, 410; 1 Bing. 94; *Ex parte Sherwood*, 7 Moore, 493; *Ex parte Davis*, 1 Chit. 729; *Ex parte Maliphant*, 7 Moore, 495; *Ex parte Murray*, Turn. & R. 56.

⁴ *Ex parte Dent*, 1 Barn. & Ald. 189; *Ex parte Winter*, 1 Barn. & Ald. 190, note.

⁵ *Ex parte Leacroft*, 4 Barn. & Ald. 90; *Ex parte Christian*, 3 Moore, 578.

See, as to taking out and renewing the annual certificate, Reg. Gen. Q. B. C. P. & Ex. H. T. 16 Vict. 1853; 1 El. & B. app. 63; 16 and 17 Vict. chap. 63, sec. 1; 54 Geo. III, chap. 144; 23 and 24 Vict. chap. 127, secs. 18, 19, 22, 23; 6 and 7 Vict. chap. 73, sec. 26; *Keegan v. Mowlds*, 10 L. T. N. S. 822; *Ex parte Barnes*, 2 B. C.

§ 56. Registration of attorneys' names.—The residence of many attorneys in London and Westminster being difficult to find, and consequently much inconvenience arising in regard to serving them with papers, a rule was made in the Court of King's Bench¹ that the master should prepare an alphabetical book, and that the same should be kept at the master's office, in the King's Bench Walk, to be there inspected by any attorney, or his clerk, without fee or reward, and that every attorney practicing in this court, and resident in London and Westminster, or within ten miles of the same, should enter in such book, in alphabetical order, his name and place of abode, or some other proper place within the cities of London and Westminster, where he might be served with notices, summonses, orders, and rules; and that as often as any such attorney should change his place of abode, or the place where he might be so served with notices, summonses, orders, and rules, he should make the like entry thereof, in the said book; "and that all notices, summonses, orders, and rules, which do not require a personal service, shall be deemed sufficiently served on such attorney if a copy thereof shall be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, that then the fixing up of any notice, or the copy of any summons, order, or rule, for such attorney, in the said master's office, shall be deemed a sufficient service, unless the matter be such as shall require a personal service."

Accordingly, it is usual for practitioners who live remote from the inns of court, or chanœry, to add to the place of their abode

R. 156; 5 Dowl. & L. 294; *Ex parte Webb*, 4 D. & D. 641; *Ex parte Weymouth*, 5 Dowl. & L. 60; 2 B. C. R. 102; 7 and 8 Viet. chap. 86, sec. 4; *Ex parte Seewood*, 8 Jur. 404; *Ex parte Gude*, 1 Dowl. & L. 675; 7 Jur. 1016; *Ex parte Grey*, 5 Dowl. & L. 275; 12 Jur. 119; *Ex parte Taylor*, 16 Jur. 728; *Ex parte Sewell*, 32 Beav. 475; *Anon.* 16 Jur. 222; *Ex parte Smith*, 33 Beav. 248; *Ex parte Bray*, 2 Dowl. & L. 9; 8 Jur. 875; 13 Law J. Q. B. 240; *Ex parte Rudge*, 2 Dowl. N. S. 682; 7 Jur. 581; 12 Law J. Q. B. 187; *Greene v. Reece*, 8 Com. B. 88; *Richards v. Sutfield*, 2 Ex. 616; 6 Dowl. & L. 22; 12 Jur. 731; 17 Law J. Ex. 362; *Ex parte Brunswick*, 4 Ex. 492; 13 Jur. 1058; 19 Law J. Ex. 112; *Fullalove v. Parker*, 12 Com. B. N. S. 246; 8 Jur. N. S. 1078; 31 Law J. Com. P. 239; 10 Week. R. 581; 6 L. T. N. S. 353; *In re Angell*, 6 Dowl. & L. 141; *Holdgate v. Slight*, 2 Lown. M. & P. 662; 21 Law J. Q. B. 74; *Matchett v. Parks*, 9 Mees. & W. 767; 1 Dowl. N. S. 924; *Ex parte Robinson*, 2 Dowl. & L. 9; 8 Jur. 621.

¹ Hil. 8 Geo. III; Tidd's Pr. 71; Imp. K. B. 33; Lofft. 357.

the name and place of abode of some other person, where, and with whom, notices, summonses, orders, rules, and other proceedings that do not require personal service,¹ may be left for them, near to such inns; but when the name and place of abode of the attorney are entered, then service at that place is the proper service.

§ 57. Practicing in the names of each other.—If an attorney's name is set to a process without authority, the proceedings may be set aside, and an attachment granted against the plaintiff's attorney;¹ and a judgment entered up by an attorney's clerk, in the name, but without the knowledge or consent of a regular attorney, will be set aside.² If an attorney acts in the name of another, a demand of costs by the acting attorney is good.³ It has been decided that if an attorney gives leave to another to practice in his name, he is answerable for what he does in his name.⁴

§ 58. Effect of want of qualification.—Although a party subjects himself to various penalties for acting as an attorney or solicitor without the requisite qualification, yet generally it does not affect the proceedings taken by him in that character, and they cannot be treated as a nullity, whether taken in the name of the unqualified person, or in that of a regular attorney, without his consent;⁵ nor will they afford ground of error in the proceedings;⁶ but the courts will, on proof of the circumstances, order the proceedings stayed until a proper attorney is appointed,⁷ or to be set aside altogether if the client was aware of the want of qualification on the part of the attorney⁸ whose name is made use of.

¹ *Oppenheim v. Harrison*, 1 Burr. 20; *Hawkins v. Edwards*, 4 Moore, 603.

² 5 Burr. 2660.

³ Say. R. 95.

⁴ 12 Mod. 666.

⁵ *Bayley v. Thomson*, 2 Dowl. 655; 2 Car. & M. 673; *Hill v. Mills*, 2 Dowl. 696; *Reg v. Burgess*, 3 Nev. & P. 366; 8 Ad. & E. 275.

⁶ *Haydon v. Udjun*, Cro. Jac. 521.

⁷ *Bayley v. Thomson*, 2 Dowl. 665; *Hawkins v. Edwards*, 4 Moore, 603; *Chadwick v. Hough*, 2 Crompt. M. & R. 29, 164; *Marsden's Bail*, 4 Dowl. P. C. 654.

⁸ *Norton v. Curtis*, 3 Dowl. 245; *Oppenheim v. Harrison*, 1 Burr. 20; *Hopwood v. Adams*, 5 Burr. 2660; *Welch v. Pribble*, 1 Dowl. & R. 215; *Reader v. Bloom*, 10 Moore, 261; 3 Bing. 9; *Smith v. Wilson*, 1 Dowl. P. C. 215, 245; 2 Dowl. 655;

An unqualified person practicing as an attorney cannot recover his fees, or any remuneration, for his trouble ; and where such proceedings are, for form's sake, taken in the name of a regularly admitted attorney, neither the one nor the other can recover ;¹ nor will the courts, in such cases, allow the costs to be recovered, indirectly, by an execution at the suit of the client, if the latter has not already advanced them to the attorney ;² but where the client is not aware of the attorney's disqualification, and has made advances to him on account of the costs, he is generally entitled to recover costs to the extent of those advances, he consenting to take no advantage of his privilege in any pending proceedings.³

§ 59. Re-admission.—An attorney who has been stricken off the rolls may be re-admitted.⁴ The applicant must, before the commencement of the term next preceding that in which he intends to apply to be re-admitted, give notice thereof as in the case of an original admission.⁵ But the court will not re-admit an attorney who has discontinued practice for thirty years.⁶ Persons convicted of misconduct, offenses, and especially felonies, will not be re-admitted,⁷ except under very special circumstances.

§ 60. The 6 and 7 Vict., chap. 73.—By the 6 and 7 Vict., chap. 73, sec. 1, no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other

Hilcary v. Hungate, 3 Dowl. 56; *Glyn v. Hutchinson*, 2 Ad. & E. 660; 3 Dowl. 529; *Peterson v. Powell*, 9 Bing. 620.

¹ *Hopkinson v. Smith*, 7 Moore, 243; 1 Bing. 13.

² *Meek v. Whalley*, 1 Bing. N. C. 59; 2 Dowl. 823.

³ *Wilson v. Knapp*, 8 Dowl. 426; *Reader v. Bloom*, 10 Moore, 261. See *Young v. Dowlman*, 3 Younge & J. 24; *Humphrey v. Harvey*, 4 Moore & S. 500; 1 Bing. N. C. 59; 2 Dowl. 823.

⁴ *Rex v. Greenwood*, 1 W. Black. 222; *Ex parte Makinson*, 18 C. B. 661.

⁵ Reg. Gen. Q. B. C. P. and Exch. H. T. 16 Vict. r. 7; 1 El. & B. app. 63; 23 and 24 Vict. chap. 127, sec. 25; *Ex parte Calland*, 2 B. & A. 315. See *In re Sill*, 2 Jur. N. S. 1232. See *Ex parte Cole*, 1 Doug. 114.

⁶ *Ex parte Billings*, 5 D. P. C. 395; 2 Har. & W. 327. See *Ex parte Brabant*, 7 D. P. C. 622; 2 W. W. & H. 46; 3 Jur. 1152.

⁷ *Hawden*, *Ex parte*, 9 D. P. C. 970; 5 Jur. 508; *In re Garbett*, 18 Com. B. 403; *In re Pike*, 11 Jur. N. S. 504, 860; 34 Law J. Q. B. 121, 220. See *In re Robins*, 11 Jur. N. S. 504; 34 Law J. Q. B. 121.

proceeding, in the name of any other person, or in his own name, in the High Court of Chancery, or Courts of Queen's Bench, Common Pleas, Exchequer, or in certain specified, inferior, and special courts, or in any other court of law or equity in England or Wales, or act as an attorney or solicitor in any cause, matter, or suit, civil or criminal, to be heard, tried, or determined before any justice of assize, etc., unless such person be admitted and enrolled, and otherwise duly qualified to act as an attorney or solicitor, and be on the roll at the time of his acting in such capacity.¹

¹ See as to articulated clerks, admission, etc., *ante*, §§ 45-58.

The 6 and 7 Vict., chap. 73, (1843) consolidating, amending, and repealing the former English statutes in regard to attorneys, repealed the following acts:

An act admitting attorneys—15 Edw. II, chap. 1.

An act regulating attorneys—4 Hen. IV, chap. 18.

An act providing that no lord of a franchise shall be attorney within the same—4 Hen. IV, chap. 19, and portions of the act 1 Hen. V, chap. 4.

An act touching warrants of attorney—18 Hen. VI, chap. 9.

An act regulating the number of attorneys in Norfolk, Suffolk, and Norwich—33 Hen. VI, chap. 7.

So much of the acts concerning misleading, jeofails, and attorneys, as related to entering warrants of attorney—32 Hen. VIII, chap. 30, and 18 Eliz., chap. 14 sec. 3.

An act to reform the multitudes and misdemeanors of attorneys and solicitors at law, and to avoid unnecessary suits and charges at law—3 James I, chap. 7.

So much of an act for the amendment of the law, and the better advancement of justice, as related to the filing of warrants of attorney—4 and 5 Anne, chap. 16.

An act for the better regulation of attorneys and solicitors—2 Geo. II, chap. 23.

A portion of the 5 Geo. II, chap. 18.

An act to explain and amend the act 2 Geo. II, chap. 23—6 Geo. II, chap. 27.

A portion of the 12 Geo. II, chap. 13 (so much as related to attorneys).

A portion of the 22 Geo. II, chap. 46 (so much as related to attorneys).

A portion of the 23 Geo. II, chap. 26 (so much as related to attorneys).

A portion of the 30 Geo. III, chap. 19 (so much as related to the 2 Geo. II, chap. 23.)

So much of the 37 Geo. III, chap. 90, as related to attorneys.

An act to amend the several acts for the regulation of attorneys and solicitors (except so far as the attorneys and solicitors of Ireland were affected thereby)—1 and 2 Geo. IV, chap. 48. And the amendatory act, 3 Geo. IV, chap. 16 (with the same exceptions).

So much of the 1 and 2 Wm. IV, chap. 56, to establish a court of bankruptcy, as related to the admission and practicing of attorneys and solicitors in said courts.

So much of the 5 and 6 Wm. IV, chap. 11, as related to the service of any clerk, and his admission and enrollment as an attorney or solicitor, or as to striking any person off the roll.

So much of the 6 and 7 Wm. IV, chap. 7, as related to striking any attorney or solicitor off the roll.

The judges may, before admission, examine and inquire, by such ways and means as they may think proper, touching the articles and service, and the fitness and capacity of the candidates to act as attorneys; and may then, if satisfied, have the attorney's oath administered, in addition to the oath of allegiance; and after such oaths are taken, they cause the applicant to be admitted an attorney of the court, and his name to be enrolled as an attorney of the court.

For the purpose of facilitating the inquiry touching the due service under articles, and the fitness and capacity of the person to act as attorney, it is lawful for the judges of the superior

The act 1 Vict. chap. 56, for amending the several acts for the regulation of attorneys and solicitors.

So much of the 1 and 2 Vict. chap. 45, as related to the admission and practice of attorneys and solicitors.

So much of the following acts to indemnify, etc., as related to striking any attorney or solicitor off the roll. viz: The 7 Wm. IV, chap. 12; 1 Vict. chap. 16; 2 and 3 Ibid. chap. 33; 3 Ibid. chap. 16; 4 Ibid. chap. 11; 5 Ibid. sess. 2, chap. 10; 6 Ibid. chap. 9.

The following acts were not repealed or altered by the 6 and 7 Vict. chap. 73, viz:

An act for allowing attorneys to make suits to several courts—20 Hen. III, chap. 10.

An act against champerty—3 Edw. I, chap. 25.

An act inflicting penalty upon a serjeant or pleader committing deceit—3 Edw. I, chap. 29.

An act against maintainers of quarrels being suffered—3 Edw. I, chap. 33.

An act, viz: Certain actions wherein, after appearance, the tenant shall not be essoined, but may make his attorney—3 Edw. I, chap. 42.

An act, amongst other things, that attorneys may be made, where an appeal lieth not—6 Edw. I, chap. 8.

An act authorizing persons to make general attorneys in all pleas for or against them—13 Edw. I, chap. 49.

The acts 28 Edw. I, chap. 11; and 12 Edw. II, chap. 1.

The acts 7 Rich. II, chap. 14; and 7 Hen. IV, chap. 13.

An act that all persons, religious and secular, may make their general attorneys to sue or plead for them in every Hundred and Wapentake—15 Hen. VI, chap. 7.

The acts 3 Hen. VII, chap. 1; 18 Eliz. chap. 5; 29 Eliz. chap. 5; 31 Eliz. chap. 10.

The act 4 and 5 Anne, chap. 16, for the amendment of the law, and the better advancement of justice, except so much as relates to filing warrants of attorney.

The act 12 Geo. I, chap. 29; 19 Geo. III, chap. 68; 23 Ibid. chap. 33; 24 Ibid. chap. 42; 25 Geo. II, chap. 80; 34 Geo. III, chap. 14; 39 and 40 Ibid. chap. 104; 44 Ibid. chap. 59; 44 Ibid. chap. 98; 49 Ibid. chap. 28; 52 Ibid. chap. 63; 54 Ibid. chap. 144; 55 Ibid. chap. 184; 6 Geo. IV, chap. 16; 7 and 8 Ibid. chap. 29; 9 Ibid. chap. 25; 11 Ibid.; and Will. IV, chap. 70.

courts, or any eight or more of them, of whom the chiefs of the courts shall be three, from time to time to nominate and appoint such persons to be examiners, and to make rules and regulations for conducting the examination.

The master of the rolls, jointly with the judges, may nominate and appoint examiners to make rules and regulations for conducting the examination of persons applying to be admitted as attorneys and solicitors, authorized to practice both in the courts of law and the Court of Chancery.

Following is the prescribed oath: "I, ———, do swear (or solemnly affirm, as the case may be) that I will truly and honestly demean myself in the practice of an attorney, (or solicitor, as the case may be) according to the best of my knowledge and ability. So help me God."¹

No person who has been admitted and enrolled is liable to be struck off the roll for or on account of any defect in the articles of clerkship, or in their registry, or in the service under the articles, or in the admission and enrollment, unless the application for striking him off be made within twelve months from the time of his admission and enrollment, except in cases of fraud.² An attorney must not act as agent for persons not qualified. If he does, he may be stricken from the roll.³ Any person having taken the degree of bachelor of arts or bachelor of laws in the Universities of Oxford, Cambridge, Dublin, Durham, or London, or in the Queen's University in Ireland, or the degree of bachelor of arts, master of arts, bachelor of laws, or doctor of laws, in any of the universities of Scotland, none of such degrees being honorary degrees, and who, at any time after having taken such degree, and either before or after the passing of this act, has been bound by and has duly served under articles of clerkship to a practicing attorney or solicitor for the term of three years, and has been examined and sworn, as provided by law, may be admitted and enrolled as an attorney or solicitor.⁴ Where any person has, before the passing of

¹ 6 and 7 Vict. chap. 73, secs. 15, 16, 17, 18, 19.

² 6 and 7 Vict. chap. 73. sec. 29.

³ 6 and 7 Vict. chap. 73, sec. 32.

⁴ 23 and 24 Vict. chap. 127, secs. 1 and 2, August 28th, 1860, amending the 6 and 7 Vict. chap. 73, and the 7 and 8 Vict. chap. 86, and the 14 and 15 Vict. chap. 88.

the act, and at any time, after having taken such degree, been bound for five years, he may, after having duly served three years of such term in such manner as would have been required if he had been bound for three years only, and having been examined and sworn, and, with the consent in writing indorsed on his articles of the attorney or solicitor to whom he may be bound, to the immediate determination of his articles, be admitted and enrolled; and where such consent is given and acted upon by the person so made eligible to be admitted and enrolled, the articles of clerkship shall be deemed to have determined as if by effluxion of time.

Persons having been *bona fide* clerks to attorneys, solicitors, or proctors, for ten years, may be admitted after three years' service.¹ The judges may make regulations for persons who have passed certain examinations in the universities before articles, to be admitted after four years' service.

The judges may require examination in general knowledge, either before articles or before admission, with power to dispense therewith in specified cases;² but this provision is only applicable to persons who have not taken degrees or successfully passed the university examinations. The judges may also require an examination in legal knowledge during the articles to ascertain the progress of the student.

The 23 and 24 Vict., chap. 127, sec. 10, entitled "An Act to amend the laws relating to attorneys, solicitors, proctors, and certified conveyancers," and passed in 1860, enacted, in section 10, that no person thereafter bound by articles of clerkship to any attorney or solicitor shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever other than the employment of clerk to such attorney or solicitor, and his partner or partners, if any, in the business, practice, or employment of an attorney or solicitor, save as by the Act 6 and 7 Vict., chap. 73, or the Act of 1860, otherwise provided, and that every person bound as aforesaid shall, before being admitted an attorney or solicitor, prove by the affidavit required under the fourteenth section of the Act of 6 and 7 Vict., that he has not held any office or engaged in any employment

¹ 23 and 24 Vict. chap. 127, sec. 24.

² Ibid. secs. 7, 8, 9.

contrary to the enactment now in recital, and that the form of such affidavit as aforesaid shall be varied by such addition thereto as may be necessary for that purpose.

The restriction contained in this enactment is not to be enforced in certain cases, where such consent and sanction as is provided by the Act of 37 and 38 Vict., chap 68, are obtained. That act, called the Attorneys' Act of 1874, and applicable only to England and Wales, provides that sec. 10 of the 23 and 24 Vict., above referred to, shall not apply to any cases in which any person bound by articles, as therein mentioned, shall, before or after he enters upon the office, or engages in the employment, have applied for and obtained—

1. The consent thereto in writing of the attorney or solicitor to whom he is bound; and—

2. The sanction thereto of one of the judges of one of the superior courts of law at Westminster, or the master of the rolls, or one of the judges of the High Court of Justice, to be evidenced by an order of such judge.

This section applies to the case of any person bound by articles expiring after or not more than two years before the passage of the Act of 1874, who shall have held any office, or been engaged in any employment during the service under such articles, before or after the passage of this latter act; and who, within one year after such passage, or within one year after the expiration of his articles, shall prove by an affidavit from the attorney or solicitor to whom he is bound, or by such other evidence as shall be satisfactory to such judge, that the holding of such office, or being engaged in such employment, was with the consent of the attorney or solicitor to whom he was or is bound, and has not interfered with due service under such articles; and the judge hearing such application shall have power to make any order which he shall think fit as to the service by the person so bound as aforesaid, for the remainder of the term of service of his articles, or any part thereof, after the acceptance of such office, or as to the passing of any examination.

Not less than fourteen days before any such application to a judge is made, written notice of the application must be given to the registrar, which notice must state the names and residences of the applicant, and of the attorney or solicitor to whom

he is bound, the nature of the office or employment, and the time it is expected to occupy. Any such judge making any such order may, in and by the order, impose on the applicant such terms and conditions touching the office or engagement, and his employment therein, as such judge thinks fit. If any should be imposed, and the person authorized by the order shall accept the office, or engage in the employment, he shall, before being admitted an attorney or solicitor, prove to the satisfaction of a judge of one of the superior courts of law at Westminster, or the master of the rolls, or one of the judges of the High Court of Justice, and of the examiners, for the time being, appointed under the provisions of the Act of 1860, or amendatory acts, to examine persons applying to be admitted as attorneys and solicitors, that he has duly observed and fulfilled those terms and conditions.¹

The examination before admission must extend to the fitness and capacity of the applicant to act in matters of business usually transacted or performed by attorneys or solicitors.²

§ 61. Solicitors and attorneys under the Supreme Court of Judicature Act of England, 1873.—By the English Supreme Court of Judicature Act of 1873, 36 and 37 Vict., chap. 66, sec. 87, all persons admitted as solicitors, attorneys, or proctors, of or by law empowered to practice in any court the jurisdiction of which is by the act transferred to the High Court of Justice or the Court of Appeal, shall be called solicitors of the Supreme Court, and shall be entitled to the same privilege, and be subject to the same obligations, so far as circumstances will permit, as if the act had not been passed; and all persons who, from time to time, if the act had not been passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of, or been by law empowered to practice in, any such courts, shall be entitled to be admitted, and to be called solicitors of the Supreme Court, and shall be admitted by the master of the rolls, and shall, as far as circumstances will permit, be entitled, as such solicitors, to the same privileges, and

¹ 37 and 38 Vict. chap. 68; 23 and 24 Vict. chap. 127, sec. 10; 6 and 7 Vict. chap. 73.

² 23 and 24 Vict. chap. 127, secs. 10, 11.

be subject to the same obligations, as if the act had not been passed. Solicitors, attorneys, or proctors, to whom the section applies, shall be deemed to be officers of the Supreme Court, and that court, and the High Court of Justice, and the Court of Appeal, respectively, or any division or judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of the superior courts of law or equity might have exercised previously to the passage of the act in respect of any solicitor or attorney admitted to practice therein.

By an act to amend and extend the Supreme Court of Judicature Act of 1873, (36 and 37 Vict., chap. 66) Parliament, in 1875, enacted¹ that, whereas, under sec. 87 of the principal act, solicitors and attorneys will, after the commencement of that act, be called solicitors of the Supreme Court, the registrar of attorneys and solicitors in England shall be called the registrar of solicitors, and the lord chief justice of the Court of Common Pleas, and the lord chief baron, or any two of them, may from time to time, by regulation, adopt any enactments relating to attorneys, and any declaration, certificate, or form required under those enactments, to the solicitors of the Supreme Court, under sec. 87 of the principal act.

§ 62. Colonial Attorneys' Relief Act, 1874.—By the Colonial Attorneys' Relief Act, 20 and 21 Vict., chap. 39, certain provisions were made for regulating the admission of attorneys and solicitors of colonial courts in her majesty's superior courts of law and equity in England.

By the Statute 37 and 38 Vict., chap. 41, so much of the former act as enacted that no person shall be deemed qualified to be admitted as attorney or solicitor, under the provisions of the act, unless he shall pass an examination to test his fitness and capacity, and shall make affidavit that he has ceased, for the space of twelve calendar months at the least, to practice as attorney or solicitor in any colonial court of law, and also so much of the act, and of any orders and regulations made thereunder, as relate to such examination, shall not apply to, nor shall compliance therewith, respectively, be required of, any person seeking to be admitted under its provisions, who shall have been in

¹ 38 and 39 Vict. chap. 77, sec. 14.

actual practice for the period of seven years, at the least, as attorney and solicitor in any colony or dependency, as to which an order in council has been, or may be, made as mentioned in the said act, and who shall have served under articles, and passed an examination previously to his admission as attorney and solicitor in any such colony or dependency.¹

§ 63. Attorneys and Solicitors' Act for Ireland, 1866.

By the Attorneys and Solicitors' Act for Ireland, 1866, entitled "An Act to amend the laws for the regulation of the profession of attorneys and solicitors in Ireland, and to assimilate them to those of England," the various laws relating to the admission and enrollment of attorneys and solicitors, and to the service of indentured apprentices to attorneys and solicitors in Ireland, were amended, altered, and consolidated.² A registrar of all such attorneys, solicitors, and apprentices was also established.

In the construction of the act, unless there is something in the subject or context repugnant to such construction, the word "attorney" means attorney of one or more of the superior courts of law at Dublin; the word "solicitor" means solicitor of the High Court of Chancery in Ireland; the word "registrar" signifies the registrar of attorneys and solicitors; the expression "the roll of attorneys and solicitors kept by the registrar" means the roll or book of attorneys and solicitors, which by the act the registrar is required to keep; and the expression "the Incorporated Law Society" means the society of the attorneys and solicitors of Ireland, acting under their then existing or any future charter.

Admission and enrollment.—No person can act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit, or defend any action, suit, or other proceeding, in the name of any other person, or in his own name, in the High Court of Chancery in Ireland, or in the courts of Queen's Bench, Common Pleas, or Exchequer at Dublin, or in the Court of Bankruptcy and Insolvency in Ireland, or in her majesty's Court of Probate in Ireland, or in the Landed

¹ 37 and 38 Vict. chap. 41; 20 and 21 Vict. chap. 39.

² 29 and 30 Vict. chap. 84.

Estates Court in Ireland, or in the court of any chairman of any county or riding of a county, or in any court of civil or criminal jurisdiction, or in any other court of law or equity in Ireland, or act as an attorney or solicitor before any justice of assize, of oyer and terminer, or gaol delivery, or at any general or quarter sessions of the peace for any county, riding, division, liberty, city, borough, or place, or before any justice or justices, unless such person shall have been previously to the passing of the act (August 6th, 1866) admitted and enrolled, and otherwise duly qualified to act as an attorney or solicitor under or by virtue of the laws in force, or unless such person should, after the passage of the act, be admitted and enrolled, registered, and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions and regulations of the act, and unless such person shall continue to be so duly qualified and registered and on the roll at the time of his acting in such capacity, with some enumerated exceptions.¹

No person to be admitted without serving an apprenticeship of five years.—The applicant must have been bound by indentures of apprenticeship to serve as an apprentice for and during the term of five years to a practicing attorney or solicitor in Ireland, and shall have duly served under such indentures for and during the said term of five years; and such person must also, after the expiration of the said term of five years, have been examined, in the manner directed, and sworn as by the laws in force required, previously to such admission, enrollment, and registration.

No attorney or solicitor can take or retain any apprentice who shall be bound by indentures, after such attorney or solicitor shall have discontinued or left off practicing as, or carrying on the business of, an attorney or solicitor, nor whilst such attorney or solicitor shall be retained or employed as a writer or clerk by any other attorney or solicitor; and service by any apprentice under indentures to an attorney or solicitor for and during any part of the time that such attorney or solicitor shall be so employed as writer or clerk by any other attorney or solicitor, shall

¹29 and 30 Vict. chap. 84, sec. 3.

not be deemed or accounted as good service under such indentures.¹

Bankruptcy of attorney.—In case any attorney or solicitor to whom any apprentice shall be bound by indentures shall, before the end or determination of the contract, become bankrupt, or take the benefit of any act for the relief of insolvent debtors, or be imprisoned for debt, and remain in prison for twenty-one days, it is lawful for any of the courts of law or equity wherein such attorney or solicitor is admitted, upon the application of the apprentice, to order the indentures to be discharged, or assigned to such person and upon such terms and in such manner as the act provides, or otherwise, as the court thinks fit.²

Persons taking degrees at the universities.—Any person having taken the degree of bachelor of arts or bachelor of laws in the University of Oxford, Cambridge, Dublin, Durham, or London, or in the Queen's University in Ireland, or the degree of bachelor of arts, master of arts, bachelor of laws, or doctor of laws in any of the universities of Scotland, none of such degrees being honorary degrees, and who at any time after having taken such degrees, and either before or after the passing of this act, has duly served under indentures of apprenticeship to a practicing attorney or solicitor for the term of three years, and has been examined and sworn in accordance with the practice of the Court of Chancery, or superior courts of law in Ireland, may be admitted and enrolled and registered as an attorney or solicitor. Where any person has before the act, and at any time after having taken such degree, been bound for any period exceeding three years, he may, after having duly served three years of such term in such manner as would have been required if he had been bound for three years only, and having been examined and sworn, and with the consent in writing (indorsed on his indentures of apprenticeship) of the attorney or solicitor to whom he may be bound to the immediate determination of his indentures of apprenticeship, be admitted, enrolled, and registered as an attorney or solicitor, and where such consent is given and acted upon by the person eligible to be admitted, enrolled, and registered, the indentures of apprenticeship are

¹ 29 and 30 Vict. (1866) chap. 84, secs. 4, 5. ² 29 and 30 Vict. chap. 84, sec. 6.

deemed to have determined as if they had determined by effluxion of time.¹

Persons having been admitted at the bar may be admitted after three years' service.—Every person who has been called to the degree of utter barrister in Ireland, and after ceasing to be a barrister has been bound by indenture to serve as an apprentice, for any term exceeding three years, to a practicing attorney or solicitor, and has in either of such cases continued in service for the term of three years, and during the whole of such three years served in the manner required for persons who have taken degrees in the universities, and been examined and sworn after the expiration of such term of three years, may be admitted, enrolled, and registered as an attorney and solicitor: provided, that in the case of any such person who has been bound for a period exceeding three years, it is necessary for such term to be determined with consent, as in the case of persons having taken degrees who may have been bound for a period exceeding three years before the passing of the act.²

Persons attending certain lectures and passing certain examinations admitted after four years' service.—Every person who, as a matriculated or as a non-matriculated student of the University of Dublin, or any of the queen's colleges in Ireland, shall have attended or shall attend any prescribed lectures, and shall have passed or shall pass any prescribed examinations, of the professors of the faculty of law in the University of Dublin, or in any of the queen's colleges, for a period of two collegiate years, and who shall have duly served as an apprentice under indentures for the term of four years, in like manner as by the act provided respecting the service for the term of five years, shall, at any time after the expiration of five years from the commencement of attendance on such lectures or of such period of service, which shall first happen, be qualified to be sworn and to be admitted as an attorney or solicitor respectively, according to the nature of his service of the several and respective superior courts of law or equity in Ireland, as fully and effectually, to all intents and purposes, as any person having been bound and having served five years is qualified to be sworn,

¹ 29 and 30 Vict. 1866, chap. 84, sec. 7.

² *Ibid.* sec. 8.

and to be admitted or enrolled and registered an attorney or solicitor under or by virtue of the act.¹

Bona fide clerks to attorneys or solicitors for ten years may be admitted after three years' service.—Any person who shall, for the term of ten years, have been a *bona fide* clerk to an attorney or solicitor, and during that term shall have been *bona fide* engaged in the transaction and performance, under the direction and superintendence of such attorney or solicitor, of such matters of business as are usually transacted and performed by attorneys and solicitors, and who shall produce to the examiners satisfactory evidence that he has faithfully, honestly, and diligently served as such clerk, and who, after the expiration of the ten years' term, and after having been examined as may have been or may be required for the time being of persons seeking to become apprentices to attorneys or solicitors, has been bound by and has duly served under indentures of apprenticeship to a practicing attorney or solicitor for three years, and has been examined and sworn as provided for the admission of attorneys and solicitors, may be admitted and enrolled as an attorney and solicitor.

No such apprentice who shall have served two years or upward of such term of ten years in the Dublin office of an attorney or solicitor, or firm of attorneys or solicitors, shall be required to attend lectures or keep terms in Dublin during his apprenticeship.²

The necessary affidavit.—Whenever any person is bound by indentures to serve as an apprentice to any attorney or solicitor, the latter shall, within six months after the date of the indentures, make and duly swear, or cause or procure to be made and duly sworn, an affidavit of such attorney or solicitor having been duly admitted, and also of the actual execution of every such indentures by him, the said attorney or solicitor, and by the apprentice; and in every such affidavit shall be specified the names of the attorney or solicitor and the apprentice, and their places of abode respectively, together with the day on which the indentures were actually executed. Every such affidavit must be filed within six months next after the execution of the

¹ 29 and 30 Vict. (1866) chap. 84, sec. 9.

² Ibid. secs. 10, 11.

indentures, with and by the officer appointed or to be appointed for that purpose, who shall thereupon enroll and register the indentures, and make and sign a memorandum of the day of filing such affidavit upon the affidavit, and also upon the indentures.¹ The affidavit must be produced on applying for admission, unless the court or judge shall be satisfied that the same cannot be produced, and shall think fit to dispense with its production. A book is to be kept for entering the substance of the affidavits, with the names and residences of the attorney or solicitor, and of the apprentice, which book may be searched by any person during office hours.

Apprentices whose masters have died, or left off practice, may enter into fresh indentures for the residue of the term; and so if the indentures have been canceled by mutual consent, or if the apprentice is legally discharged before the expiration of the term by order of court. A similar affidavit must be made, as before mentioned, of the execution of the second indentures. The apprentice may also be bound by assignment of his former indentures.² In case of difficulty in procuring assignments, the courts have power to order the indentures to be assigned to such person as to the court or judge may seem fit, and the assignment so made has the same effect as a voluntary one.

Apprentices, before admission, must make the affidavit of actual service, and that they have not held any office or engaged in any employment whatsoever other than the employment of apprentice. The form of the affidavit is to be approved by the judges of the court.

Certain judges specified may require examination in the general knowledge of the applicant, either before indentures or before admission; and power is granted to them to dispense with the same in special cases. Before being bound or admitted, as the case may be, the applicant must obtain from the examiner a certificate of having satisfactorily passed the examination.³

The judges may also require an examination of the clerk in legal knowledge during the time he is articulated, so as to ascertain

¹ 29 and 30 Vict. (1866) chap. 84, secs. 12, 13.

² *Ibid.* secs. 13-16.

³ *Ibid.* secs. 17-19.

the progress he has made. Persons, on applying for admission, must also be examined as to their fitness and capacity. If found qualified, the usual oath is administered, and the applicant is admitted an attorney or solicitor of the court, and his name is enrolled and registered. The examination, before admission, extends to the fitness of the applicant to transact all business usually transacted by attorneys or solicitors.¹

Persons duly admitted attorneys of any one of the superior courts of law at Dublin are entitled, upon production of their admission therein, or an official certificate thereof, and that the same still continues in force, to be admitted as an attorney in any other of the superior courts, or in any inferior court of law in Ireland, upon signing the roll of such court where any roll exists.

Striking off the rolls.—No person who has duly served his apprenticeship under indentures is prevented or disqualified from being admitted and enrolled; nor liable to be struck off the roll if admitted, in consequence of his master, to whom he was bound, having been after such services struck off the roll, provided the apprentice be otherwise entitled to be admitted and enrolled; nor is any person admitted and enrolled liable to be struck off the roll on account of any defect in the indenture of apprenticeship, or in the registry thereof, or in his service under the indentures, or in his admission and enrollment, unless the application for striking him off the roll be made within twelve months from the time of his admission and enrollment, except in cases of fraud.²

Where the name of any attorney or solicitor is ordered to be struck off the roll on his own application, or that of any other person, the rule or order for that purpose must be entered with the registrar, and the latter must strike such name off the roll and mark the order as having been entered.

Upon the production of an office copy of the order of the superior courts of law or court of chancery, and an affidavit of identity, the name of such person may be stricken from the rolls of any other court in which he practices, or suspended for the time mentioned in the order, and, *mutatis mutandis*, the same practice obtains in case of his restoration to the rolls.

¹ 29 and 30 Vict. chap. 84, secs. 20-25.

² *Ibid.* secs. 38-40.

Every person who acts as an attorney or solicitor contrary to the statute, or who in his own name, or in the name of any other person, acts as a proctor without being qualified, is guilty of a contempt of court, and may be punished accordingly; and is incapable of maintaining any action or suit for any fee or reward, or for his disbursements, and he also forfeits in addition the sum of £50.

The judges or the courts have power to dispense with these statutory regulations under special circumstances.¹

§ 64. Scotland—Members of the Faculty of Advocates in Scotland may be admitted as attorneys and solicitors in England and Wales.—It was enacted by sec. 15 of the Act 23 and 24 Vict., chap. 127, that every person who had been admitted and enrolled as a writer to the signet or solicitor before the supreme courts in Scotland, or a procurator before any of the sheriff's courts of Scotland, should be entitled to be admitted and enrolled as an attorney or solicitor in England on three years articles; and by the Statute of 35 and 36 Vict., chap. 81, passed in 1872, similar privileges were conferred on members of the Faculty of Advocates in Scotland; and every person who has been admitted a member of the Faculty of Advocates in Scotland, and who, whether before or after the passage of the act, has duly served under articles of clerkship in England or Wales, to a practicing attorney or solicitor for the term of three years, and has been examined and sworn in manner directed by the Act of 6 and 7 Vict., chap. 73, and amendatory acts, may be admitted and enrolled as an attorney and solicitor in England and Wales.²

§ 65. In the United States.—It is not lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law, and any person offending against the prohibition of this statute shall be deemed guilty of a high misdemeanor.³ The same prohibition extends to clerks,

¹ 29 and 30 Vict. chap. 84, secs. 44, 45, 46, 48.

² 35 and 36 Vict. chap. 81; 23 and 24 Vict. chap. 127; 6 and 7 Vict. chap. 73.

³ 2 U. S. Stats. at L. 788.

assistant or deputy-clerks, of any territorial, district, or circuit court, or of the Court of Claims, or the Supreme Court of the United States, to marshals and deputy-marshals of the United States within the district for which they are appointed, as to any cause depending in either of said courts, or in any district for which they are acting as such officers.¹ Whosoever violates these last provisions shall be stricken from the roll of attorneys by the court, upon complaint, upon which the respondent shall have due notice, and be heard in his defense; and in the case of a marshal or deputy-marshal so acting, he shall be recommended by the court for dismissal from office.² Members of either house of Congress cannot practice in the Court of Claims.³

Bankruptcy.—Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Either party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court. The name of the attorney or counsellor, with his place of residence and business, shall be entered upon the docket with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed, as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not required to be served on the party personally, may be served upon his attorney.⁴

No allowance shall be made against the estate of the bankrupt for fees of attorneys, solicitors, or counsel, except when necessarily employed by the assignee, when the same may be allowed as a disbursement. The necessity and reasonableness of disbursements shall in all cases be passed upon by the court.⁵

§ 66. United States Supreme Court.—It is requisite to the admission of attorneys or counsellors to practice in the Su-

¹ 17 U. S. Stats. at L. 411.

² *Ibid.*

³ 12 U. S. Stats. 765.

⁴ General Orders in Bankruptcy, adopted April 12th, 1875, Supreme Court of United States, No. III; Desty's Fed. Proc. p. 338; *In re Hill*, 1 Ben. 326; *In re Sutherland*, Deady, 573.

⁵ General Orders *ut supra*, No. 30, Desty's Fed. Proc. p. 338.

preme Court of the United States, that they shall have been such for three years past in the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.¹ They are required to take and subscribe the following oath or affirmation, viz :

“I, —, do solemnly swear (or affirm, as the case may be) that I will demean myself, as an attorney and counsellor of this Court, uprightly and according to law ; and that I will support the Constitution of the United States.”²

In all the courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said court respectively, are permitted to manage and conduct causes therein.³ Every person who is indicted of treason, or other capital crime, shall be allowed to make his full defense by counsel learned in the law ; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours.⁴ In all criminal prosecutions, the accused is guaranteed by the Constitution of the United States the right to have the assistance of counsel for his defense.⁵

§ 67. Alabama.—The following persons only are entitled to practice in the courts of this State.⁶

1. Those who have been regularly licensed under the laws of the State before the adoption of the Code of 1867.

¹ Rules of Supreme Court of United States, Rule 2; original rule promulgated February 5th, 1790, 1 Cranch, xvi; 1 Wheat. xiii; 1 Peters, vi. Revised and corrected December Term, 1858, 21 How. 5; Ex parte Tillinghast, 4 Peters, 108.

² Original Rule 6, February 7th, 1791, 1 Cranch, xvii; 1 Wheat. xiv; 1 Peters, vi; revised and corrected December Term, 1858, 21 How. v. Original Rules 3 and 4, February 5th, 1790, 1 Cranch, xvi; 1 Wheat. xiii; 1 Peters, vi. Rule 14, 1 Cranch, xviii; 1 Wheat. xvi; 1 Peters, vii; promulgated August 12th, 1801, relating to attorneys and counsellors; abrogated on revision and correction December Term, 1858, 21 How. v; amendment to the second clause promulgated March 10th, 1865, 2 Wall. vii; was rescinded at December Term, 1866, 4 Wall. vii. (Desty's Fed. Proc. pp. 245, 246.)

³ 1 U. S. Stats. at L. 92.

⁴ 1 U. S. Stats. 118.

⁵ Constitution United States, Amendment VI. This right is incorporated in some shape in most of the State constitutions.

⁶ Revised Code Ala. 1867, secs. 861 *et seq.*-896. See *Withers v. The State*, 36 Ala. 252.

2. Those afterward admitted by a license from the supreme court, the court of chancery, or a circuit court.

Those previously regularly licensed can practice only in such courts as their license authorizes them. Those afterward admitted to the supreme court may practice in all the courts in the State, and those admitted by any chancery or circuit court may practice in any court of the State except the supreme court.¹

Any white male of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, is entitled to admission to practice in any or all the courts of the State. He must apply to the supreme court, the court of chancery, or the circuit court, and must show that he is of the age of twenty-one years, which proof may be made by his own affidavit; that he is of good moral character, which may be proved by certificate or other evidence satisfactory to the court.

No judge of any court of the State, chancellor, sheriff, or deputy sheriff, can practice in any court of the State, nor any clerk or register in his own court, under prescribed penalties. Attorneys from other States, having a license to practice law therein, may practice in any of the courts of this State, when by law the attorneys of Alabama are permitted to practice law in such other State, such attorneys, when practicing in the courts of Alabama, being subject to the Alabama rules and regulations.

Examination of applicant.—The applicant must also be examined in open court touching his knowledge of the law of real and personal property, pleading, evidence, commercial and criminal law, chancery, chancery pleading, and the statute law of the State. If, on examination, the applicant is found duly qualified in all these branches, the court must direct an order to be entered, reciting the qualifications above mentioned, and upon the entry of such order, obtaining his license, and taking the oath prescribed, he is entitled to practice accordingly. Circuit judges and chancellors may license minors, if possessing the maturity, character, and attainments requisite, but the minors so licensed shall be precluded from pleading infancy in any civil proceeding

¹ Revised Code Ala. 1867, secs. 861 *et seq.*—896. See Withers v. The State, 36 Ala. 252.

against them. The supreme court may, at its discretion, appoint a committee of three members of its bar to examine an applicant for license, either privately or in open court, and must grant or refuse license according to the report of such committee.

Oath.—Every attorney, before commencing practice, must take an oath to support the Constitution of the State and of the United States, and not to violate the duties enjoined on him by law. The oath must be filed in the office of the clerk or register of the court by which he is licensed. The penalty for practicing before taking and filing is \$200, one-half to the use of the person suing for the same, and the other to the use of the State. But any person may conduct and manage his own case in any court without license.

§ 68. Arizona Territory.—Any white male citizen, possessing the necessary qualifications, (they being substantially the same as in Arkansas¹) is entitled to admission as attorney and counsellor in all the courts of the Territory by the supreme court. The applicant must produce satisfactory testimonials of good moral character, and undergo a strict examination in open court, as to his qualifications, by one of the judges of the supreme court of the Territory. If, upon examination, he be found duly qualified, the court admits him as attorney and counsellor in all the courts of the Territory, and directs the order to be entered, and a certificate of the record given to him by the clerk, which certificate shall be his license. The district courts may also admit persons having the same qualifications to their own courts, upon similar proceedings.

Every person, on his admission, must take an oath or affirmation to support the Constitution of the United States and of the Territory, and to discharge the duties of attorney and counsellor to the best of his knowledge and ability. A certificate of such oath or affirmation shall be indorsed on the license. The examination may be dispensed with in the case of a person who has been admitted attorney and counsellor in the highest courts of a sister State; his affidavit of such admission, or his license show-

¹ See *infra*, § 69.

ing the same, is deemed sufficient to entitle him to admission. A roll is to be kept by the clerk. Persons practicing without a license are guilty of contempt, and punished accordingly. This, however, is not applicable to justices' or recorders' courts.¹

§ 69. Arkansas.—Every male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, may, upon application, be admitted to practice as an attorney and counsellor at law in the courts of this State. No judge has power to license any applicant to practice law. The power is exercised only by the courts of the State, by proper orders duly recorded. Every applicant is to be examined in open court, and before his admission must produce to the court, by sworn petition, satisfactory proof of the qualifications mentioned, and shall take an oath to support the Constitution of the United States, and of the State, and faithfully to discharge the duties of the office upon which he is about to enter. The usual roll is to be kept.

Every person who attempts to practice law in any court of record without being licensed, sworn, and registered, as required, shall be deemed guilty of a contempt of court, and shall be punished as in other cases of contempt. No clerk of any court of record, or sheriff, while acting as such, can, under any pretense, act as an attorney at law in the court of which he is clerk, or the county of which he is sheriff.²

§ 70. California.—Any white male citizen, or white male person resident of this State, who has *bona fide* declared his intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counsellor in all courts of this State.³

¹ Compiled Laws Ariz. 1864-71, p. 343.

² Ark. Digest, 1874, secs. 485-490.

³ Code Civil Procedure Cal. sec. 275. See 3 Cal. 108; 8 Cal. 570; 15 Cal. 387; 17 Cal. 61; 20 Cal. 427; 22 Cal. 293; 24 Cal. 241; 31 Cal. 11; 33 Cal. 425; 35 Cal. 534. Compensation: 1 Cal. 331; 2 Cal. 507; 3 Cal. 108; 5 Cal. 435; 6 Cal. 56; 8 Cal. 306; 13 Cal. 640; 17 Cal. 610. Actions against: 3 Cal. 108; 13 Cal. 203; 22 Cal. 200; 33 Cal. 425. Notice to: 31 Cal. 128; 31 Cal. 160.

Every applicant for admission as an attorney and counsellor must produce satisfactory testimonials of good moral character, and undergo a strict examination in open court as to his qualifications, by the justices of the supreme court; provided, that the several county and district courts of this State may admit applicants to practice as attorneys and counsellors in their respective courts.¹

Applicants for license to practice as attorneys and counsellors are examined in open court, on the first day of the term, and on that day only. Persons applying for admission otherwise than upon examination, must personally appear in court, at the time the motion for their admission is made. No applicant will be examined unless he shall have filed with the clerk of the court, on or before the first day of the term at which he presents himself for examination, a certificate signed by at least two attorneys of the court, each of whom shall have been regularly engaged in practice as such for at least four years next theretofore, stating in substance that they have and that each of them has carefully and diligently examined the applicant, touching his qualifications in point of learning in the law, to be admitted to practice; that it satisfactorily appeared to them, and to each of them, upon such examination, that the applicant had been engaged in the study of the law for a period of time to be named in the certificate, naming the place at which, and the person under whom, if any, such study had been prosecuted; that the applicant had during that time read certain books of law, which books shall be enumerated in the certificate; and stating any other fact tending to show the extent of the attainments of the applicant, and also that in their opinion the applicant possesses the requisite qualifications in point of law learning to entitle him to be admitted to practice. No person rejected shall be at liberty to renew his application earlier than the third regular term next after his rejection.²

If, upon examination, the applicant is found qualified, the court must admit him as attorney and counsellor in all the courts of the State, and direct an order to be entered to that effect

¹ Code Civil Procedure Cal. sec. 276.

² Rules of Supreme Court, took effect Dec. 6th, 1875. Rule 1, Ibid. amended April 13th, 1876.

upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license.

Every person, on his admission, must take an oath to support the Constitution of the United States, and of the State, and to discharge the duties of attorney and counsellor to the best of his knowledge and ability. A certificate of such oath must be indorsed on the license. Every white male citizen of the United States, admitted to practice law in the highest court of a sister State, may be admitted to practice in the courts of this State, upon the production of his license, and satisfactory evidence of good moral character; but the court may examine the applicant as to his qualifications. Each clerk must keep a roll of attorneys and counsellors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives his license. If any person shall practice law in any court, except a justice's or police court, without having received a license as attorney and counsellor, he is guilty of a contempt of court.¹

In California, the statute regulates the method in which attorneys are to be admitted. Satisfactory testimonials of good moral character are in all cases required, and in general a strict examination as to professional qualifications is exacted. The rule requires that the applicant must personally appear in court at the time the motion for his admission is made. It is made the absolute duty of the court to make examination in all cases in which the applicant has not been admitted in the courts of a sister State, or of the Supreme Court of the United States, or in that of the District of Columbia. But even in case the applicant has been admitted in one of these courts, the statute has provided that the court may examine him as to his qualifications. It becomes, therefore, the duty of the court to determine, even in a case where the application for admission is based upon a license from one of the enumerated courts, whether or not the applicant shall be first examined in open court.

So where an application was made for admission, the applicant not appearing, but urging that he was laboring under a

¹ Code Civil Procedure Cal. secs. 277-281. An act to exclude traitors and alien enemies from courts of justice in California (Stats. 1863, p. 566) was repealed (Stats. 1867-8, p. 8).

disability to appear because of a physical injury which temporarily prevented his personal appearance in court, that he had a license showing that he had been admitted to practice in all the courts of a sister State, and offering satisfactory evidence of good moral character, his application was denied. The court said: "It is obvious that without the personal presence of the applicant but little, if any, opportunity would be afforded for a satisfactory determination in this respect; and if in a given case we should in our discretion determine that an examination of the applicant should first take place, such examination could not be proceeded with in his absence. We think that this provision of the statute fairly imports of itself that the applicant must be personally present, and in this view we cannot, of course, dispense with the statute, even if we were disposed to relax the rule made for ourselves, which we are not."¹

§ 71. Dakota Territory.—Any person twenty-one years of age, who is an inhabitant of the Territory, who satisfies any court of record, either on examination or by certificate of admission from any other Territory or State, that he possesses the requisite learning and is of good moral character, may, by such court, be licensed to practice as an attorney and counsellor. No person shall be admitted to practice in the supreme court unless he shall have been first licensed to practice in some one of the district courts, or, on the presentation of a certificate of admission, to practice in the supreme court of some other Territory or State. The prescribed oath is as follows:

"You do solemnly swear that you will support, protect, and defend the Constitution of the United States, and the Organic Act of the Territory of Dakota; that you shall do no falsehood, or consent that any be done in court, and if you know of any you will give knowledge thereof to the judges of the court, or some one of them, that it may be reformed; you shall not, wittingly, willingly, or knowingly, promote, sue, or procure to be sued, any false or unlawful suit, or give aid or consent to the same; you shall delay no man for lucre or malice, but shall act in the office of attorney in this court according to your best

¹ Ex parte Snelling, 44 Cal. 553.

learning and discretion, with all good fidelity, as well to the court as to your client. So help you God.”¹

§ 72. In Illinois, under a statute,² no person can commence or prosecute a suit in any court of record, as “agent” for a party, unless he has been regularly admitted and licensed as an attorney at law, and his license entered on the roll, and his name subscribed to the roll. A suit thus instituted will be dismissed on motion. The right, however, of parties to conduct their own causes is protected. If a party has incurred any liability by practicing as an attorney, and receiving fees before his name was enrolled, or if he seeks to recover for services performed as an attorney before his name was entered on the roll, the court cannot aid him by permitting the clerk to make the entry *nunc pro tunc*; it would affect his rights or privileges.

The attorney should have his name entered on the roll of attorneys at the date of his license.³

§ 73. Iowa.—The supreme court may, on motion, admit any practicing attorney of the district or circuit court to practice in the supreme court upon his taking the usual oath of office. Persons who have never been admitted to practice law in the courts of any other State, may be admitted by the supreme court to practice in all the courts of the State.

On the application of any such person to be admitted, the court will appoint three or more members of the bar of the supreme court to examine such applicant, touching his qualifications. If, from an inspection of the report of the committee, the court shall be satisfied that the applicant possesses the requisite learning, and is of good moral character, it will order that he be licensed to practice in all the courts of the State upon taking the oath of office. The oath is to support the Federal and State Constitutions, and to faithfully discharge the duties of attorney and counsellor to the best of the applicant's ability.⁴

¹ Revised Codes of Dakota, 1877, p. 31, chap. 18.

² Revised Laws Ill. 99; Gale Stat. 81; Robb v. Smith, 3 Scam. 46.

³ Ex parte Fellows, 2 Scam. 369.

⁴ Rules, 43 Iowa, 708; Code, sec. 208.

§ 74. Nevada.—The supreme court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counsellors at law. Such committee will consist of the district judges and at least two attorneys resident of the district. The examination by the committee so appointed shall be conducted and certified according to the following rules :

The applicant shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination. The examination shall embrace the following subjects : the history of the State and the United States ; the constitutional relations of the State and Federal governments ; the jurisdiction of the various courts of the State and of the United States ; the various sources of municipal law ; the general principles of the common law relating to property and personal rights and obligations ; the general grounds of equity jurisdiction and principles of equity jurisprudence ; rules and principles of pleadings and evidence ; practice under the State, civil, and criminal codes ; remedies in hypothetical cases ; the course and duration of the applicant's studies.

The examination is not expected to extend into details, but only sufficiently so to fairly test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied. When the examination is completed and reduced to writing, the examiners are to certify and return it to the supreme court, accompanied by a certificate showing whether or not the applicant is of good moral character, and has obtained his majority, and is a *bona fide* resident of the State.¹ In the supreme court, applicants for license to practice as attorneys and counsellors will be examined in open court on the first day of the term.²

§ 75. New York.—The following are the new rules regulating admissions to the bar, in the court of appeals, adopted September 28th, 1877 ; in effect October 1st, 1877 :³

¹ Rules Supreme Court Nevada, Rule 24, 11 Nev. 15.

² Ibid. Rule 1, 11 Nev. 10.

³ 16 Alb. L. J. 242, Oct. 6th, 1877.

1. No person shall be admitted to practice as an attorney or counsellor in any court of record in the State, except as provided in these rules, without a regular admission and license by the supreme court, at a general term thereof, after a satisfactory examination, conducted by the judges of such court, or by at least three practicing lawyers of at least seven years' standing at the bar, to be appointed for one year at the first general term held in each year in the respective departments. The members of such committee of examination may be removed at any time by the court, and vacancies for any cause, or non-attendance, may be supplied during the year.

2. To entitle an applicant to an examination as an attorney, he must prove to the court :

That he is a citizen of the United States, twenty-one years of age, and a resident of the department within which the application is made, and that he has not been examined in any other department for admission to practice, and been refused admission and license, within three months immediately preceding, which proof may be made by his own affidavit. That he is a person of good moral character, by the certificate of the attorneys with whom he has passed his clerkship ; but such certificate shall not be conclusive, and the court must be satisfied on this point from examination and inquiry. That he has served the clerkship, or pursued the substituted course of study prescribed by the rules. The clerkship may be proved by the certificate of the attorney with whom the same was served, or, in case of their death or removal from the State, by other satisfactory evidence. The time of study allowed as a substitute for any part of the clerkship may be proved by the certificate of the teacher or the president of the faculty under whose instructions the person has studied, in addition to the affidavit of the applicant. The proof must be satisfactory to the presiding judge of the court, who alone shall make the order allowing a deduction from the regular term of clerkship by reason of such studies.

3. No person shall be admitted to an examination as an attorney unless he shall have served a regular clerkship of three years in the office of a practicing attorney of the supreme court after the age of eighteen years. An allowance of one year shall be made to applicants who are graduates of any college or uni-

versity. Any portion of time, not exceeding one year for graduates receiving the foregoing allowance, and two years for other applicants, actually spent in regular attendance upon the law lectures or the law school connected with any college or university of the State having a department organized with competent professors and teachers, in which instruction is regularly given, shall be allowed in lieu of an equal period of clerkship in the office of a practicing attorney of the supreme court; but in no case shall an applicant be entitled to an examination as an attorney without having served a clerkship in the office of a practicing attorney of the supreme court for the period of at least one year.

4. It shall be the duty of attorneys, with whom a clerkship shall have been commenced, to file a certificate of the same in the office of the clerk of the court of appeals. The clerkship shall be deemed commenced from the time of such filing, and a certified copy of the certificate and of the filing shall be produced at the time of the application for examination.

5. The examination and admission provided for in the previous rules shall entitle the applicant to a license to practice as an attorney only. At the expiration of two years from the time of his admission as attorney, he may apply to the general term for examination as a counsellor. Upon such application, he shall, upon his own affidavit or otherwise, satisfy the court that during two years since he was admitted as attorney, he has been actually engaged in the practice of law as a clerk in the office of a practicing attorney or otherwise, or in attending a law school or law lectures, as provided in Rule 3. It shall be the duty of the court to cause an examination of the applicant to be made, either by the judge holding the court, or by a committee, as provided in Rule 1; and if satisfactory, to license him to practice as a counsellor. Any person admitted as an attorney of the supreme court may practice as an attorney and counsellor in county courts.

6. Persons who have been admitted as attorneys in the highest courts of another State, may be admitted to examination as attorneys and counsellors if they have served a regular clerkship of one year in the office of a practicing attorney of the supreme court in this State, and shall, in other respects, be entitled to

such examination. If the time of clerkship served in another State, and the time that such applicant has practiced law after his admission in another State, including the year of clerkship required in this State, shall not in the aggregate equal five years, then the applicant shall only be licensed as an attorney; and after such time shall aggregate five years, he may apply for admission to an examination as counsellor, and be licensed, as in the case of other applicants.

7. Any person who has been admitted and has practiced three years as an attorney and counsellor in the highest court of law in another State, may be admitted and licensed without examination. But he must possess the other qualifications required by these rules, and must produce a letter of recommendation from one of the judges of the highest court of law of such other State, or furnish such other satisfactory evidence of character and qualifications.

8. Not more than three months' vacation shall be allowed in any year. The time of clerkship shall be computed by the calendar year; and if the period of clerkship shall expire during the term at which application is made, the applicant may be admitted on any day during the term. The same period of time shall not be duplicated for different purposes. The judges of the Supreme Court may adopt regulations for conducting the respective examinations, and may require a portion of either or both to be in writing.¹

A male citizen of the State, of full age, applying to be admitted to practice as an attorney or counsellor in the courts of record of the State, must be examined at a general term of the supreme court, by the justices holding the term, or a committee appointed by them. If it is found that he has complied with the rules established by the Court of Appeals for that purpose, and he is approved by the justices holding the term, for his good character and learning, the court must direct an order to be entered stating those facts, and admitting him to practice as an attorney and counsellor in all the courts of record of the State. Thereupon, after qualifying, he is entitled to practice,

¹ Adopted Sept. 28th, 1877; in force Oct. 1st, 1877; 16 Alb. L. J. 242, Oct. 6th, 1877. See New Code N. Y. secs. 56-60.

subject to suspension or removal in proper cases. The Court of Appeals has power to dispense, in the rules adopted by it, with the whole or any part of the stated period of clerkship required from an applicant, or with an examination, where the applicant is a graduate of the Albany Law School, the law department of Union University, or of the law department of the University of the City of New York, or of the law school of Columbia College, or of the law department of Hamilton College, and produces his diploma upon his application for admission.¹

The applicant, on admission, must take the constitutional oath of office in open court, and subscribe the same in a roll or book to be kept in the Supreme Court for that purpose. The clerk, upon the payment of the fees allowed by law, must deliver to the person admitted a certificate under his hand and official seal, stating that such person has been so admitted, and that he has taken and subscribed the constitutional oath of office. A person regularly admitted to practice as attorney and counsellor in the courts of record of the State, whose office for the transaction of law business is within the State, may practice as such attorney or counsellor, although he resides in an adjoining State. Services of papers may be made upon him by mail. Clerks of courts and other court officers, except attorneys, cannot practice in their own tribunals. No person can ask or receive, directly or indirectly, compensation for appearing as attorney in a court in the city and county of New York, or in the county of Kings, or make it a business to practice as an attorney in a court in either of those counties, unless he has been regularly admitted to practice as an attorney and counsellor in the courts of record of the State. Violations of this provision are punished by fine or imprisonment, or both.² If an attorney dies, is removed or suspended, or otherwise becomes disabled to act at any trial before judgment in an action, no further proceeding shall be taken in the action, against the party for whom he appeared, until thirty days after notice to appoint another attorney has been given to that party, either personally,

¹ Wait's N. Y. Code of Civil Procedure, (1877) secs. 56, 57, 58.

² Ibid. secs. 59-64.

or in such other manner as the court directs. The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law.¹

§ 76. Pennsylvania.—In all civil suits or proceedings in any court within the Commonwealth, every suitor and party concerned has a right to be heard by himself and counsel, or either of them. The judges of the several courts of record respectively have power to admit a competent number of persons of an honest disposition, and learned in the law, to practice as attorneys in their respective courts.² Before any attorney admitted shall make any plea at the bar, except in his own case, he shall take an oath or affirmation as follows:

“You do swear (or affirm) that you will support the Constitution of the United States, and the constitution of this Commonwealth, and that you will behave yourself in the office of attorney within this court according to the best of your learning and ability, and with all good fidelity as well to the court as to the client; that you will use no falsehood nor delay any person's cause for lucre or malice.”³

No judge, alderman, justice of the peace, (in any case which is removed from before him by appeal or by a writ of *certiorari*) nor any prothonotary or clerk, (in his own court) nor the register of wills, (in the orphan's court) shall practice as attorney or counsellor.⁴

¹ Wait's N. Y. Code of Civil Procedure, (1877) secs. 65, 66.

² The admission is held to be a judicial and not a ministerial act, and is therefore not the subject of a writ of mandamus. (Brackenridge's Case, 1 Serg. & R. 187; McLaughlin's Case, 5 Watts & S. 272.) If an attorney is admitted under a misapprehension of facts, the court will rectify the error by striking his name from the roll. (Brown's Case, 8 Pitts. L. J. 1.)

³ 1 Brightly's Purdon's Dig. Pa. p. 99. The attorney violates this oath when he presses for an unjust judgment, or for the conviction of an innocent man. (Rush v. Cavanaugh, 2 Pa. 189.)

⁴ The above is deemed sufficient to illustrate the rules governing the admission of attorneys in the United States.

See statutory provisions as to admission, license, qualifications for admission, summary jurisdiction over attorneys, etc., in the following States and Territories: *Colorado*—General Laws, 1877, p. 90, 1 Colorado R. xxiii. *Connecticut*—General Statutes, Revision of 1875, p. 44. *Delaware*—Revised Code, 1874, pp. 141, 564. *Florida*—Bush's Digest, p. 90. *Georgia*—Code 1873, sec. 387 *et seq.*; Rules 38 Ga. 687. *Idaho*—Revised Statutes, 1874, 1875, p. 582. *Illinois*—55 Ill. xxviii. *Iowa*—Code 1873, p. 35; Rules, 43 Iowa, 708. *Kansas*—1 Dassler's Kansas Stat-

utes, 1876, p. 53. *Kentucky*—General Statutes, p. 147. *Louisiana*—Rules, 21 La. An. xi, xii. *Maryland*—Code 1867, sec. 10. *Maine*—Revised Statutes, 1871, p. 597. *Minnesota*—2 Statutes at Large, 1873, pp. 953-6. *Mississippi*—Revised Code, 1871, sec. 2244. *Missouri*—Wagner's Statutes, 1872, p. 198. *Montana*—Codified Laws, 1871, p. 374. *Nebraska*—General Statutes, 1873, p. 94. *Nevada*—Compiled Laws, sec. 884 *et seq.* *North Carolina*—Public Laws, 1868-9, p. 118. *Ohio*—Revised Statutes, Swan & Critchfield, vol. 1, p. 92. *Oregon*—General Statutes, p. 397. *Tennessee*—Statute Laws, 1871, art. 3965 *et seq.* *Texas*—Paschal's Annotated Digest, 1875, pp. 135, 137. *Utah*—Act of Feb. 18th, 1852. *Wisconsin*—General Statutes, 1871, secs. 1344, 1345. *Wyoming*—Compiled Laws, 1876, p. 15.

CHAPTER IV.

SUMMARY JURISDICTION OF COURTS OVER ATTORNEYS—STRIKING FROM THE ROLLS—SUSPENSION FROM PRACTICE—ATTACHMENT—CONTEMPT—ETC.

- § 77. Liability to summary jurisdiction..
- § 78. Liability on undertakings.
- § 79. For acting without authority.
- § 80. Striking from the rolls.
- § 81. Instances of misconduct authorizing suspension or disbarring.
- § 82. Restoration.
- § 83. Practice.
- § 84. Whether mandamus will lie.
- § 85. Striking from rolls for defect in articles.
- § 86. Barratry.
- § 87. Maintenance.
- § 88. Champerty.
- § 89. Striking from the rolls at attorney's own request.
- § 90. Responsibility of the judiciary in civil actions for striking an attorney's name from the rolls.
- § 91. Compelling disclosure as to abode or occupation of client—Requiring attorney to produce client.
- § 92. Delivery up of documents.
- § 93. Papers in attorney's hands for professional purposes.
- § 94. Compelling payment of money.
- § 95. Summarily imposing costs.
- § 96. Answering matters of affidavit.
- § 97. Contempts—Attachments against attorneys.
- § 98. Contempts in the United States courts.
- § 99. Miscellaneous offenses.
- § 100. Statutory regulations in England.
- § 101. Statutory regulations in Alabama.
- § 102. Statutory regulations in Arkansas.
- § 103. Statutory regulations in California.
- § 104. Statutory regulations in New York.
- § 105. Statutory regulations in Pennsylvania.

§ 77. Liability to summary jurisdiction—Extent of.—

The liability of attorneys which may be fixed and reached by the exercise of the summary jurisdiction of the court, extends to liabilities on their undertakings with clients ; to cases when they act without authority ; to cases of attachment against them for various offenses and delinquencies ; to striking them from the rolls

and suspending them from practice ; to the offense of permitting others to use their names ; to compelling in proper cases the disclosure of the client's abode or occupation, and to compelling them to produce the client, and to disclose a certain class of communications, concerning which we shall treat more fully in the chapter upon privileged communications ; to delivering up documents ; to the paying of money and of costs ; to the answering of matters of affidavits ; to contempts of court, and to professional misconduct generally.

While these matters will sometimes call for a mention of the relation between attorney and client, it is conceived that the subject belongs to the vocation of the lawyer, inasmuch as this summary power is the exercise of a jurisdiction over an officer of the court as an officer, rather than a regulation of his relative duties as an attorney of a client.

Attorneys, as officers of the court, are liable to the summary jurisdiction of the tribunals in which they practice, for any want of good faith and honesty in their relations with their clients. The question of negligence will not generally be tried on motion, but only questions of good faith and integrity.¹ Proceeding on motion for money collected by an attorney will not bar an action on the case for negligence.² But proceeding by action for money collected is usually a waiver of the right to proceed by attachment.³ In New York, any attorney being guilty of, or consenting to, any deceit or collusion with intent to deceive the court, has been deemed to be guilty of a misdemeanor, and subject to a forfeiture to the party injured in treble damages, to be recovered in a civil action.

As substantiating Blackstone's statement that the attorneys of Westminster Hall have been "peculiarly subject to the censure and animadversion of the judges," it has been decided that the judges will exercise their summary jurisdiction over the attorneys of the several courts not merely in cases where they have been employed in the conduct of suits, or any matter

¹ *Sharp v. Hawker*, 3 Bing. N. C. 66; *Brazier v. Bryant*, 2 Dowl. P. C. 600; *In re Jones*, 1 Chit. 651; *De Woolfe v. —*, 2 Chit. 68; *In re Fenton*, 3 Ad. & E. 404; *In re Aitkin*, 4 Barn. & Ald. 47; *Cohen v. Wright*, 22 Cal. 315.

² *Coopwood v. Baldwin*, 25 Miss. 129.

³ *Cottrel v. Finlayson*, 4 How. Pr. 242; *Bohanan v. Peterson*, 9 Wend. 503.

purely professional, but "whenever the employment is so connected with their professional character as to afford a presumption that their character formed the ground of their employment."¹ Thus, an attorney has been compelled to give up papers and deeds which had been placed in his hands as steward for the owner of the estates to which they referred, and another to pay over money which he had received when employed to collect the effects of an intestate by the administrator, although he had never been employed by him to prosecute or defend any suits in law or equity.²

But in the first place, the court will not generally entertain a motion touching the conduct of an attorney unless it appears that he is an attorney of the court, or that the transaction arises in part, at least, out of a cause before the court;³ but an attorney who has acted as such in a certain court, and signed an undertaking as such in that court, cannot refuse to perform that undertaking on the ground that he is not an attorney of that court.⁴

In the absence of any suggestion of fraud or misconduct, the lapse of a considerable period of time, as for instance seven years, after the settlement of transactions between attorney and client, will operate as a bar to any summary interference with an attorney.⁵ One who has once been an attorney remains liable to the summary jurisdiction of the court for his conduct whilst he was an attorney, although he may have taken his name off the roll, and ceased to be one.⁶ Where an attorney has been guilty of gross misconduct the court will interfere summarily, although

¹ So early as the Statute 4 Henry IV, chap. 18, it was enacted that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty, and many subsequent statutes have laid them under further regulations. (3 Jac. I, chap. 7; 12 Geo. I, chap. 29; 2 Geo. II, chap. 23; 22 Ibid. chap. 46; 23 Ibid. chap. 26.)

² *Huges v. Mayer*, 3 T. R. 275; *In re Aitkin*, 4 Barn. & Ald. 47; *Luxmore v. Lethbridge*, 5 Barn. & Ald. 898; *De Wolf v. —*, 2 Chit. 68; *Ex parte —*, 2 Dowl. O. S. 110; *In re Dakin*, 4 Hill, 44.

³ *In re Lord*, 2 Scott, 131; 1 Hodges, 195; *In re Phillips*, 3 Jur. 479; 1 W. W. & H. 418; *Anon.* 19 Law J. Ex. 219; *Cole v. Grove*, 1 Scott N. R. 30; 4 Jur. 339. See *In re Knight*, 1 Bing. 41.

⁴ *Thompson v. Gordon*, 4 Dowl. & L. 49; 15 Mees. & W. 610; 15 Law J. Ex. 344. *Ex parte Shipden*, 6 Dowl. & R. 338.

⁵ *Simes v. Gibbs*, 6 D. P. C. 310; 1 W. W. & H. 401; 2 Jur. 418; *Scott v. Van Alstyne*, 9 Johns. 216; *Cole v. McClellan*, 4 Hill, 60.

the misconduct does not amount to an indictable offense, and arose in a transaction in which he was not acting in that character.¹

Courts of equity, like courts of common law, will, in the exercise of their general jurisdiction, interfere to compel solicitors to perform their duties and to punish them for malpractice and misconduct.² They have afforded equitable relief in transactions between solicitors and their clients, as to open accounts between them,³ determine the validity of securities impeached on the ground of fraud or undue influence,⁴ and will exercise the same jurisdiction within their sphere as courts of common law. But they will not investigate charges which do not clearly arise out of the solicitor's official employment, nor the validity of a private agreement.⁵ Courts will not summarily relieve a client against the negligence or ignorance of his attorney, unless it be very gross, and very clearly established by affidavits, but will usually leave the client to his remedy against the attorney by action.⁶ But where an attorney discharged a person in custody at his client's suit, upon receiving from him a security, which he knew at the time to be worthless, the court ordered him to pay his client the amount of the debt and costs.⁷ Where judgment of *non pros.* was signed through an attorney's neglect, the court ordered the attorney to pay costs;⁸ and so where a plaintiff was subjected to costs for not proceeding to trial on

¹ In re Blake, 3 El. & E. 34; 30 Law J. Q. B. 32; 16 Jur. N. S. 1242; 2 L. T. N. S. 429; Newton v. Judges, 4 Law R. P. C. 18. Excessive and extortionate charges in a bill of costs, as between attorney and client, form no ground for a summary application against an attorney in the absence of evidence of willful fraud, as the suitor is sufficiently protected by the taxation of the bill. (Meux v. Lloyd, 2 Com. B. N. S. 409.)

² Cumming v. Waggoner, 7 Paige, 603; People v. Rogers, 2 Ibid. 103; Albany Bank v. Schemerhorn, 9 Ibid. 372; Merritt v. Lansing, 10 Ibid. 352; In re Bleaskey, 5 Ibid. 311; In re Peterson, 3 Ibid. 510; Saxton v. Stowell, 11 Ibid. 526; Baldwin v. Latson, 2 Barb. Ch. 307; Magennis v. Parkhurst, 3 Green Ch. 433.

³ Lewis v. Morgan, 5 Price, 42; Mathews v. Walwyn, 4 Ves. 119.

⁴ Bellew v. Russell, 1 Brod. & B. 96; Detellin v. Gale, 9 Ves. 584; Gibson v. Jeyes, 6 Ves. 266.

⁵ Alexander v. Anderson, 6 Beav. 405.

⁶ Pitt v. Yalden, 4 Burr. 2060; Barker v. Butler, 2 W. Black. 780; Meggs v. Binns, 2 Bing. N. C. 625; 3 Scott, 52; 2 Hodges, 10; Brazier v. Bryant, 2 Dowl. O. S. 600; Rex v. Tew, Sayers, 50.

⁷ Rex v. Bennett, Sayers, 169.

⁸ Mordecai v. Solomon, Sayers, 172; Addington v. Appleton, 2 Campb. 410; De Rouigny v. Peale, 3 Taunt. 484; Rex v. Fielding, 2 Curr. 654.

account of the negligence of his attorney.¹ The application should in all cases be made promptly.²

The courts do not in general interfere summarily when the misconduct took place previously to admission, except where the attorney was fraudulently admitted;³ as where an attorney and clerk joined in the affidavit of the execution of the articles, (under the English system) and the clerk swore to the service under them, and was consequently admitted; and it afterward appearing that the articles were collusive, the pretended clerk being in fact an apprentice to a hatter, and his affidavit of service under the articles false, the court ordered the clerk to be struck off the roll, and granted an attachment against the attorney for the collusion.⁴ But in another case, where application was made to strike from the roll, on the ground of misconduct and the want of regular service in his clerkship, and the application was made three years and a half after his admission, it was refused.⁵

§ 78. Liability of attorneys on undertakings.—In applications for the summary interference of the court upon an attorney's undertaking, the question is, did he or did he not act in the particular transaction in the character of an attorney? If he did, the court will hold him liable.⁶ The court will compel the attorney to perform his undertaking to pay a sum of money, even though in respect of the debt of another, and void under the Statute of Frauds.⁷ But the guarantee must in other respects be good in form, and one on which an action would ordinarily lie.⁸ Acts of waiver on the part of the client will dis-

¹ *Langton v. Wood*, 3 Lond. Jur. 124; *Stone v. Stone*, 4 Taunt. 601.

² *Garry v. Wilks*, 2 Dowl. O. S. 649.

³ *Matter of Paige*, 1 Bing. 160; 7 Moore, 572.

⁴ *Ex parte Hill*, 2 W. Black. 991; *Matter of Taylor*, 5 Barn. & Ald. 538. See *Paget v. Chambers*, 5 Bing. 630; 7 Scott, 610.

⁵ *Matter of —*, 2 Barn. & Adol. 766.

⁶ *Burrell v. Jones*, 3 Barn. & Ald. 47; *Hall v. Ashurst*, 3 Tyrw. 420; *In re Swan*, 1 B. C. R. 99; 10 Jur. 715; 15 Law J. Q. B. 402; *In re Fairthorne*, 3 Dowl. & L. 548; 1 B. C. R. 40; 10 Jur. 287; 15 Law J. Q. B. 131; *Ex parte Hughes*, 5 Barn. & Ald. 482; *Iverson v. Corington*, 2 Dowl. & R. 307; 1 Barn. & C. 160.

⁷ *In re Hilliard*, 2 Dowl. & L. 919; 9 Jur. 664; 14 Law J. Q. B. 225. See *In re Gee*, 2 Dowl. & L. 997; 10 Jur. 694; *In re Paterson*, 1 Dowl. O. S. 468; *In re Greaves*, 1 Crompt. & J. 374n; *Evans v. Duncombe*, *Ibid.* 372; 1 Tyrw. 283. But see *Thompson v. Gordon*, 4 Dowl. & L. 49; 15 Mees. & W. 610; 15 Law J. Ex. 344.

⁸ *In re Kearns*, 11 Jur. 521.

charge the undertaking.¹ The undertaking of an attorney can only be enforced by attachment where he has given it for his client. It cannot be enforced summarily when it is given for another in a cause in which he is not concerned as attorney. The party to whom it is thus given will be left to his action.² So when the attorney gives an undertaking, being a party to a cause,³ and when he gives the client an undertaking to secure to him the debt of the opposite party.⁴ When an undertaking is given by an attorney as an attorney, the court will compel him to perform it,⁵ whether it relate to the conduct of an action or suit—as the entering an appearance;⁶ getting the client's assent to a reference to arbitration,⁷ or extend to matters wholly beside his duty as an attorney, as to pay the debt and costs, or a liquidated sum by way of damages and costs in an action in which he is attorney,⁸ to pay the amount of rent on the abandonment of a distress,⁹ to pay a sum by way of settlement of an arbitration to avoid the expense of a formal award,¹⁰ to pay the fees in a commission of lunacy,¹¹ or the costs of compromising a suit in equity.¹²

It has been considered that, to be summarily enforced, the undertaking must be given as an officer of the court acting for his client in a cause or proceeding,¹³ and so the courts have re-

¹ *Miller v. James*, 8 Moore, 208. See *State v. Haddon*, 9 D. P. C. 995; *Hill v. Fletcher*, 5 Exch. 470; 1 Lown. M. & P. 518; 19 Law J. Ex. 320.

² *Ex parte Watts*, 1 D. P. C. 512; *Walker v. Corlett*, 1 Ibid. 61; *In re Bateman*, 2 Ibid. 161; *Willmont v. Meserole*, 48 How. Pr. 430.

³ *Northfield v. Orton*, 1 D. P. C. 415; *Ex parte Clifton*, 5 Ibid. 218; 2 Har. & W. 296.

⁴ *Ex parte Evans*, 9 D. P. C. 106; 1 W. P. C. 2; 4 Jur. 991. See generally: *Harper v. Williams*, 4 Q. B. 219; 12 L. J. Q. B. 237; *Russell v. Reece*, 2 Car. & K. 669; *Lewis v. Nicholson*, 16 Jur. 1041; 21 L. J. Q. B. 311; 18 Q. B. 503; *Saxon v. Blake*, 29 Beav. 438.

⁵ *In re Gee*, 10 Jur. 694; *Strike's Case*, 1 Bland. 57.

⁶ *Anon.* 1 Chit. 129a; *Anon.* 2 Ibid. 36; *Hudson v. Handley*, 1 Crompt. & J. 373; *Mould v. Roberts*, 4 Dowl. & R. 529.

⁷ *Ex parte Hughes*, 5 Barn. & Ald. 482.

⁸ *Kite v. Milman*, 2 Moore & S. 616; *Iveson v. Corington*, 2 Dowl. & R. 307; 2 Barn. & C. 160; *Gilbert v. Cooper*, 15 Sim. 343; on appeal, 11 L. T. 169.

⁹ *Burrill v. Jones*, 3 Barn. & Ald. 47.

¹⁰ *Ex parte Fryer*, 2 Har. & W. 294.

¹¹ *Ex parte Bodenham*, 8 Ad. & E. 959.

¹² *Gilbert v. Cooper*, 15 Sim. 343; 11 L. T. 169.

¹³ *Ex parte Watts*, 1 Dowl. 512; *Walker v. Corlett*, Ibid. 61; *Ex parte Schwalbauker*, Ibid. 182; *Ex parte Cleton*, 5 Ibid. 210; *Ex parte Cowie*, 3 Ibid. 600.

fused to interfere with respect to mere contracts or promises given by attorneys.¹ But it has also been held that, if an undertaking is given by an attorney while acting in that character, it is immaterial whether he formally appear as the attorney in the suit, or professionally employed merely to compromise it.² The rule laid down by Lord Tenterden is that, "when an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him; but when the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise jurisdiction."³

In exercising the summary jurisdiction of the court over attorneys, to compel them to perform their undertakings, the court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode, but with a view to securing honesty in the conduct of its officers in all such matters as they undertake to perform, or see performed, when employed as such, or because they are such officers. It does not interfere so much between party and party to settle disputed rights, as summarily to punish, by attachment, misconduct or disobedience in its officers. The rules of law applicable to contracts are, indeed, not particularly regarded. The courts, for instance, have enforced summarily an undertaking given by an attorney on which an action would be prevented by the provisions of the Statute of Frauds; and lapse of time affords no ground for preventing the court from interfering in enforcing such an undertaking, though it does in the ordinary course of applications against attorneys.⁴

The rule that the court will summarily enforce the attorney's undertakings is founded on the principle of the trust and confidence necessarily reposed in attorneys in their professional

¹ *Bac. Abr. Atty. H.*; *Samuel v. Isaacs*, 2 *London Jurist*, 858.

² *In re Fairthorne*, 3 *Dowl. & L.* 548; 15 *Law J. N. S. Q. B.* 131; 10 *Jur.* 387.

³ *In re Aitken*, 4 *Barn. & Ald.* 47; *In re Cardross*, 5 *Mees. & W.* 547.

⁴ *In re Hilliard*, 2 *Dowl. & L.* 921; *In re Greaves*, 1 *Crompt. & J.* 374; *Evans v. Duncomb*, *Ibid.* 372; *In re Patterson*, 1 *Dowl.* 468; *In re Fairthorne*, 3 *Dowl. & L.* 548; *Titterton v. Sheppard*, *Ibid.* 775; *In re Swan*, 15 *Law J. Q. B.* 402; *Garry v. Wilks*, 2 *Dowl.* 679; *Anon.* 2 *Barn. & Adol.* 766.

character.¹ The jurisdiction has been extended to personal undertakings, whether within the scope of the attorney's authority or not.² Where an attorney undertakes to put in bail for a defendant, the court may compel him, under pain of an attachment, to put in bail or render his principal; although such undertaking, if given to the sheriff, might be void or irregular.³ The court will also enforce an undertaking, by an attorney on behalf of a client, to pay damages and costs, where the other party has been thereby induced to consent to take a verdict for a certain sum, instead of going to a jury;⁴ and where the solicitors of the assignees of a bankrupt tenant, on whose lands a distress had been levied by the landlord, gave a written undertaking as follows: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained," they were held personally bound.⁵ Although attorneys have been held strictly to the performance of undertakings, and punished for the breach of them, yet they have not usually been summarily compelled to indemnify the person to whom such an undertaking has been given, against damages arising from its breach. The remedy is against the attorney by action.⁶

§ 79. Acting without authority.—When an attorney brings an action in the name of a person without his authority, he becomes liable to the summary jurisdiction of the court, who may stay the proceedings, on motion, and make the attorney pay the costs.⁷ On an application by a defendant to stay proceed-

¹ *In re Aitken*, 4 Barn. & Ald. 47; *In re Knight*, 1 Bing. 91; *Ex parte Bodenham*, 8 Ad. & E. 595.

² *Iveson v. Conington*, 1 Barn. & C. 160; 2 Dowl. & R. 307; *Anon.* 1 Chit. 129a; 2 Chit. 36; *Morris v. James*, 2 Lond. Jur. 842. But see *Jacobs v. Magnay*, 7 Lond. Jur. 326; 12 Law J. N. S. 93.

³ *Rogers v. Reeves*, 1 Term Rep. 422; *Sedgworth v. Spicer*, 4 East, 569; *Lewis v. Knight*, 1 Dowl. O. S. 261; 8 Bing. 271; 1 Moore & S. 353.

⁴ *Kite v. Milkanau*, 2 Moore & Scott, 616.

⁵ *Burrill v. Jones*, 3 Barn. & Ald. 47. See *Hellings v. Jones*, 10 Moore, 360; 3 Bing. 70. *Ex parte Gardner*, 2 Dowl. O. S. 520; *Ex parte Hughes*, 5 Barn. & Ald. 482.

⁶ *Morris v. James*, 6 Dowl. O. S. 514.

⁷ *Hubbart v. Phillips*, 2 Dowl. & L. 707; 13 Mees. & W. 703; 14 Law J. Ex. 103; *Hoskins v. Phillips*, 16 Law J. Q. B. 339; *Harnbridge v. De la Cronée*, 3 Com. B. 742; *Bailey v. Buckland*, 5 Dowl. & L. 115; 1 Ex. 1; 11 Jur. 564; 16 Law J. Ex.

ings, on the ground that the plaintiff's attorney is going on with the action contrary to the direction of the client, the plaintiff should be made a party to the rule.¹

§ 80. Striking from the rolls.—As an attorney at law is an officer of the court, the latter may exercise its summary jurisdiction over him to the extent of depriving him of his office, and striking his name from the rolls. This the court may do in cases of malpractice, though the offence be not indictable.² Attorneys may forfeit their professional franchise by abusing it, and a power to exact the forfeiture must be lodged somewhere. Such a power is indispensable, to protect the court, the administration of justice, and themselves. Abuses must necessarily creep in, and attorneys themselves are vitally concerned in preventing the vocation from being sullied by the misconduct of unworthy members.³ The court, too, has this power on the ground of self-protection, outside of the common law, and outside of the statutory doctrine of contempt, in cases where an attorney has shown himself unfit to be one of its officers; and such unfitness may be displayed not only by moral delinquency, but by acts calculated and intended to injure the court. But charges merely affecting a person's character as a private citizen, and not his official character as an attorney, will not support an application to strike from the rolls.⁴

The power to strike from the rolls is inherent in the court itself.⁵ No statute or rule is necessary to authorize the punishment in proper cases. Statutes and rules may regulate the power, but they do not create it. It is necessary for the protection of the court, the proper administration of justice, the

204; *Westaway v. Frost*, 12 Jur. 698; 17 Law J. Q. B. 286; *Hammond v. Thorpe*, 1 Crompt. M. & R. 64; 4 Tyrw. 838; 2 D. P. C. 721; *Collins v. Johnson*, 16 Com. B. 588; 24 Law J. Com. P. 231; *Norton v. Cooper*, 3 Smale & G. 375.

¹ *Thatcher v. D'Aguilar*, 11 Ex. 436. For a fuller discussion of this subject, see *post*, Chapter IX.

² *United States v. Porter*, 2 Cranch C. C. 60; *Austin's Case*, 5 Rawle, 191.

³ *Ex parte Briggs*, 64 N. C. 202; *Ex parte Moore*, *Ibid.* 398; *In re Percy*, 36 N. Y. 651; *Anon*, 22 Wend. 656; *In re Peterson*, 3 Paige, 510; *Jackson v. State*, 21 Tex. 668; *Brown v. Brown*, 4 Ind. 627.

⁴ *People v. Allison*, 68 Ill. 151.

⁵ *In re Goodrich*, 79 Ill. 148; *In re Woolley*, 11 Bush (Ky.) 95; *Penobscot Bar v. Kemble*, 64 Me. 140; *Merritt v. Lambert*, 10 Paige, 356; *In re Martin*, 6 Beav. 237.

dignity and purity of the profession, and for the public good and the protection of clients.¹ And where certain grounds are specified by the statute, this does not necessarily exclude striking from the rolls for causes not specified. A statute is not to be construed as restrictive of the general powers of the court over its officers.² Gross offenses, such as deceit, malpractice, crime, or official delinquency or misdemeanor, are grounds for striking from the rolls: but not every moral delinquency.³ Applying abusive and opprobrious epithets to a judge in vacation cannot be considered a "contempt involving fraudulent or dishonorable conduct or malpractice" within the intent of a statute using those words.⁴ But an attorney bringing a divorce suit without authority, and acting in fraudulent collusion with a husband to procure the divorce without the knowledge or consent of the wife, is guilty of malpractice, and may be stricken from the rolls.⁵

The lighter punishment, of suspension for a certain time, is sometimes inflicted for lighter offenses, as where an attorney used indecorous language to the court in a petition for rehearing, suggesting that the court were disposed to punish him for publishing certain articles. The court ordered him to be suspended from practice for twelve months.⁶

The power to disbar an attorney proceeds upon very different grounds from the power to punish for contempt. The power is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such conduct on the part of the parties complained of as shows them unfit to be members of the profession. Parties are usually admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient

¹ *Florida v. Kirker*, 12 Fla. 278; *Fletcher v. Daingerfield*, 20 Cal. 427; *Ex parte Smith*, 28 Ind. 47; *Ex parte Brown*, 2 Miss. 303.

² *In re Mills*, 1 Mich. 392; *Beene v. State*, 22 Ark. 157; *Ohio v. Chapman*, 11 Ohio, 430; *Ex parte Secomb*, 19 How. U. S. 13; S. C. 1 How. Miss. 303.

³ *In re Mills*, 1 Mich. 392; *Starr v. Vanderheyden*, 9 Johns. 253; *Brotherson v. Consalus*, 26 How. 213; *Ex parte Brownsall*, Cowp. 829; *King v. Southerton*, 6 East, 127; *Smith's Case*, 1 Brod. & B. 522; *Leigh's Case*, 1 Munf. 481; *State v. Chapman*, 11 Ohio, 430.

⁴ *Jackson v. State*, 21 Tex. 668.

⁵ *Dillon v. State*, 6 Tex. 55.

⁶ *De Armas' Case*, 10 Mart. 123.

legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications, both in character and learning.¹ They become by such admission officers of the court, and hold their office during good behavior, and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been afforded. While there may be cases of such gross and outrageous conduct in open court as to justify very summary proceedings for the removal or suspension of an attorney from office, even then he should be heard before he is condemned. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance, no one would be safe from oppression wherever power may be lodged.

Mandamus is the appropriate remedy to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter.² And this is more necessary in the United States courts, as neither error nor appeal will lie in such cases. Without the use of the writ of mandamus, however flagrant the wrong committed against these officers, they would be destitute of redress. The attorney or counsellor disbarred through caprice, prejudice, or passion, and thus suddenly deprived of the only means of an honorable support of himself and family, upon a contrary doctrine, would be utterly remediless. It is to be considered, also, that whenever the controversy is a matter like a contempt, that rests within the discretion of the court, even mandamus will not lie to compel a court to alter the punishment if authorized by law.³

As both the admission and removal of attorneys are judicial

¹ *Ex parte Garland*, 4 Wall. 378; *Jackson v. State*, 21 Tex. 668.

² *Ex parte Robinson*, 19 Wall. 505; *Ex parte Garland*, 4 Wall. 378; *Ex parte Heyfron*, 7 How. (Miss.) 127; *Withers v. State*, 36 Ala. 252; *People v. Turner*, 1 Cal. 148; *State v. Start*, 1 Iowa, 499; *Fletcher v. Daingerfield*, 20 Cal. 430; *Beene v. State*, 22 Ark. 157; *Ex parte Bradley*, 7 Wall. 364; *Bradley v. Fisher*, 13 Wall. 354. See *Ex parte Secombe*, 19 How. 13; *Ex parte Burr*, 9 Wheat. 530; *Florida v. Kirke*, 12 Fla. 278; *White's Case*, 6 Mod. 18; *Leigh's Case*, 3 Ibid. 335; *Carth*, 169; *Rice v. Commonwealth*, 12 Fla. 472. See *McLaughlin v. Court*, 3 Wils. & S. 272.

³ *People v. Turner*, 1 Cal. 143, 188; *People v. Justices*, 1 Johns. Cas. 181; *Ex parte Burr*, 9 Wheat. 529; 2 Cranch C. C. 379; *Ex parte Secombe*, 19 How. 9. See also *post*, § 84.

acts,¹ the judges, as judicial officers, are not liable to civil actions for any judicial act done within their jurisdiction, and in case of superior courts, and courts of general jurisdiction, the judges seem not to be liable for judicial acts, even when in excess of their jurisdiction, unless, perhaps, where they are done maliciously or corruptly.² An action for damages will not, therefore, lie against a court of general jurisdiction for removing, whilst holding court, an attorney at law from the bar for malpractice and misconduct in his office, the court being empowered by statute to remove attorneys for "any deceit, malpractice, or other gross misconduct."

"The power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. And, except where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, thus affording him ample opportunity of explanation and defense."³

"This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession, as it is when the proceeding is taken to reach his real or personal property. And even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made, for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such ex-

¹ *People v. Turner*, 1 Cal. 143, 188; *People v. Justices*, 1 Johns. Cas. 181; *Ex parte Burr*, 9 Wheat. 529; 2 Cranch C. C. 379; *Ex parte Secombe*, 19 How. 9.

² *Randall v. Brighan*, 7 Wall. 523; *Floyd & Barker's Case*, 12 Coke, 25; *Taaffe v. Downes*, 3 Moore P. C. C. 41; *Hamond v. Howell*, 1 Mod. 184; 2 *Ibid.* 218; *Bushell's Case*, Vaughan, 135; *Yates v. Lansing*, 5 Johns. 283; 9 *Ibid.* 395. See also *post*, § 90.

³ *Bradley v. Fisher*, 13 Wall. 356; 7 Wall. 364; *In re Percy*, 36 N. Y. 651; *Anon.* 22 Wend. 656; *In re Peterson*, 3 Paige, 510; *Jackson v. State*, 21 Tex. 668. See *post*, § 83.

planation as would mitigate their offensive character; or he may be ready to make all proper reparation and apology. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should, therefore, never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired.”¹

“But, on the other hand, the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts.”

So that where an attorney threatened the presiding justice, as he was descending from the bench, with personal chastisement, for alleged conduct of the judge during the progress of a cause, this was held sufficient ground for striking the attorney's name from the rolls. But, even in such a case, the court errs in not citing the attorney to show cause why such an order should not be made for the offensive language and conduct, and affording him opportunity for explanation, or defense, or apology. But still such an act is a judicial act, though erroneous, and the judge cannot be held civilly liable in damages.²

The end to be attained is protection, not punishment. As punishment, removal from the office is unreasonably severe, for those cases in which the end is reclamation, not destruction, and for which reprimand, suspension, fine, or imprisonment seem to

¹ *Bradley v. Fisher*, 13 Wall. 355; 7 Wall. 364.

² *Bradley v. Fisher*, 13 Wall. 356; 7 Wall. 364; Davis and Clifford, J.J., dissenting from the rule laid down, that a judge is exempt when acting maliciously and corruptly.

be the more adequate instruments of correction; for expulsion from the bar blasts all prospects of prosperity to come, and mars the fruit expected from the training of a lifetime. For this reason, statutes to regulate attachment and summary punishment for contempts, seem to be inapplicable to this class of cases. Expulsion may be proper when there has been no contempt at all, as in cases of brutality, drunkenness, and the whole circle of infamous crimes. It is one thing to remove from office for unfitness, and another to punish for contempt. In fact, the court may have recourse to both together, and can, therefore, proceed on the ground of unfitness, and waive the contempt. Any breach of the official oath is a valid cause for proceeding in the former. The oath looks to nothing like allegiance to the person of the judge, unless in those cases where his person is so inseparable from his office that an insult to the one is an indignity to the other. But professional fidelity may be violated by acts which fall without the line of professional functions, and which may have been performed out of the pale of the court. Such would be the consequence of beating or insulting a judge in the street, for a judgment in court. An offense of this kind, practiced on a single judge of a court consisting of several, is an offense against the court, as much so as if it were repeated on each individual member, for the consequences to suitors and the public are the same. In such a case, whether the offender be guilty of contempt or not, his name may be stricken from the roll. An attempt to overawe the bench by menace, challenge, or the employment of an engine so powerful as the press, is an offense of the same stamp, the difference being but in the means of committing it. The conduct of a judge, like that of every other functionary, is a legitimate subject of scrutiny, and where the public good is the aim, such scrutiny is as open to an attorney of his court as to any other citizen. Even a battery may be committed by an attorney on a judge, consistently with the official relation, or rather not in violation of it; but it must be provoked in matters of social intercourse, or as between man and man, and the provocation must not arise out of rulings, judgments, or actions of the judge as a court or as a member of a court. This is the distinction. It is the motive, therefore, which

makes the invasion of the judge's rights a breach of professional fidelity, from which he is to be protected for the sake of the public and the suitors of his court, not for his own.

A publication of a letter in a newspaper, over the signature of members of the bar, in which it was stated that "the public confidence seems to be withdrawn, alike from the bar and the court," accompanied by a suggestion that the judge's retirement from the bench might be the means of restoring it, has been held a possible impertinence, but not a breach of professional fidelity, and not good cause for expulsion from the bar.¹

In *Ex parte Burr*, 9 Wheat. 529, the application was in the Supreme Court of the United States, for a rule to show cause why a mandamus should not issue to the circuit court for the District of Columbia, commanding that court to restore one Burr, an attorney thereof, who had by its order been suspended from practice for one year.

Marshall, C. J., in expressing some doubts as to the course the court should pursue, said: "On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him; on the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment, but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case." The application was, under the circumstances, denied, the conduct of the court below not being irregular or unjust, or void for want of jurisdiction.

¹Case of Austin and Others, 5 Rawle, 191; *State v. Kirk*, 12 Fla. 278; *Rice's Case*, 18 B. Mon. 472; *Walker v. State*, 4 W. Va. 749; *Beene v. State*, 22 Ark. 149. See *In re Wallace*, Law R. 1 P. C. 283; *Ex parte Bradley*, 7 Wall. 364; *Withers v. State*, 35 Ala. 252; *In re Moore*, 63 N. C. 397; *Ex parte Biggs*, 64 N. C. 202; *Bradley v. Fisher*, 13 Wall. 335; *Dickens' Case*, 67 Penn. 169.

The summary jurisdiction of the courts over attorneys is sufficiently accounted for by the necessary and inherent control vested in them over the conduct of their own officers, confirmed as it was by the early statute, Westminster 1, which enacted that *serjeant counters* or others (including attorneys, etc.,) guilty of malpractice, should be imprisoned and be prevented from practicing.¹ In the exercise of their *general* power, the courts at Westminster would order an attorney or solicitor to be struck off the rolls, for any gross misconduct or malpractice in the course of an action or suit,² as for willfully proceeding in an action not legally commenced;³ forging a writ;⁴ fraudulently altering a roll,⁵ record, or paper book;⁶ signing without authority pleadings at law or in equity, in another's name or in a fictitious name;⁷ procuring a witness to keep out of the way on a trial;⁸ conspiring to pack a jury;⁹ or hiring straw bail.¹⁰ In gross cases the courts have sometimes resorted to this mode of punishment, even where the conduct complained of did not occur in an action or suit, as where an attorney has grossly abused a confidence reposed in him by a client.¹¹

The courts of Westminster have also invariably ordered an attorney or solicitor to be struck off the roll after a conviction for felony, the conviction itself being considered to render the party unfit to belong to the profession.¹² The same doctrine has been applied to misdemeanors, as to sedition,¹³ extortion,¹⁴ conspiracy;¹⁵ but in these offenses the circumstances should appear, so that it may be seen whether they are of an aggravated na-

¹ *In re Martin*, 6 Beav. 337; *Rex v. Back*, 9 Price, 349; *Ex parte Fisher*, *Ibid.* 694; *Ex parte Prankerd*, 3 Barn. & Ald. 257.

² *Vin. Abr. Att'y*. "Q."

³ *Jerome's Case*, Cro. Car. 74; *Y. B. 20 Henry VI*, fol. 37.

⁴ *Osbaston's Case*, 30 Eliz. Cro. Car. 74.

⁵ 4 Inst. 100.

⁶ *Sulliard's Case*, 2 Roll. Rep. 459.

⁷ *Smith v. Matham*, 4 Dowl. & R. 738.

⁸ *Williams v. Hill*, 1 Dowl. N. S. 669; 10 Mees. & W. 28.

⁹ *Hanson's Case*, Moor. 882; 1 Brownl. 44.

¹⁰ *Dicas v. Warm*, 2 Dowl. 812; *Clifford v. Porter*, 5 Dowl. 226.

¹¹ *In re Martin*, 6 Beav. 337; *Goodwin v. Gosnell*, 2 Colly. C. C. 457.

¹² *Ex parte Brounsall*, 2 Cowp. 829; *Rex v. Vaughn*, 1 Wils. 22; 2 Halst. 162.

¹³ *Ex parte Frost*, 1 Chit. 558.

¹⁴ *Rex v. Southerton*, 6 East, 142.

¹⁵ *Anon.* 1 Chit. 557. See *Smith v. State*, 1 Yerg. 228; *In re King*, 8 Q. B. 129; 6 L. T. 149.

ture, as convictions sometimes take place where there is very slight culpability.¹ The court may strike from the rolls for subornation of perjury.²

Although attorneys cannot be called on to answer affidavits so as to disclose matter to criminate themselves,³ yet the courts have in case of imputed misconduct, which might subject an attorney to an indictment, at once entertained a motion to strike from the rolls, as where an attorney in a cause attempted to procure the absence of a witness.⁴ It has been held that any attorney convicted of a felony forfeits his office and loses his right to practice, even without an order removing him.⁵

An attorney may be removed for violating his official oath; for conviction of perjury, or other felony; for obtaining money of his client by false pretenses; for advocating the admission in evidence of a forged copy of a letter, knowing it to be forged, when offered by his associate counsel; for ceasing to possess a good moral character, and for any ill practice attended with fraud and corruption, and committed against the principles of justice and common honesty.⁶ A pardon for a felony may not affect the offense of the violation of professional oath and duty, nor relieve the attorney from the penalty of removal from the bar for this misconduct.⁷

An attempt to render an attorney incapable of performing his professional duties, in order to obtain an undue advantage of him in the trial of a cause, is good ground for striking from the roll.⁸ The institution of proceedings by one attorney, from im-

¹ *Anon.* 1 Dowl. 174, 364. See as to libels by an attorney, *Anon.* 2 Dowl. 110; *In re Harndorn*, 9 Dowl. 970. See as to forgery, perjury, subornation of perjury, barratry, etc., 12 Geo. I, chap. 99.

² *State v. Holding*, 1 McCord, 379. See also *Stephens v. Hill*, 10 Mees. & W. 28; *Anon.* 2 Halst. 162; *Ex parte Brounsall*, Cowp. 829; *Rex v. Vaughn*, 1 Wils. 22.

³ *In re —*, 5 Barn. & Ald. 1088; *Short v. Pratt*, 1 Bing. 102; *In re Knight*, *Ibid.* 142.

⁴ *Stephens v. Hill*, 11 Law J. N. S. Ex. 329; 10 Mees. & W. 28; 1 Dowl. N. S. 669.

⁵ *In re Niles*, 5 Daly, 465.

⁶ *Penobscot Bar v. Kimball*, 64 Me. 140; *Ex parte Bramhill*, Coop. 829; *Dickens' Case*, 67 Pa. 169; *People v. Ford*, 54 Ill. 520; *Rice v. Commonwealth*, B. Mon. 484; *Mill's Case*, 1 Manning, Mich. 393; *In re Percy*, 36 N. Y. 651; *Bryant's Case*, 24 N. H. 155; *Burr's Case*, 1 Wheel. C. L. 503; *Leigh's Case*, 1 Munf. 481. See *Ex parte Schenck*, 65 N. C. 353.

⁷ *Penobscot Bar v. Kimball*, *supra*.

⁸ *Dickens' Case*, 67 Pa. 169; S. C. 5 Am. R. 420.

proper motives, and without just grounds, to disbar another, is misconduct for which the court has power to impose upon the moving attorney the costs and disbursements of the proceedings.¹ Obliterating a record, and antedating a writ to avoid the effect of the Statute of Limitations, are grounds for striking from the rolls as being unprofessional conduct and malpractice.² So is forging the name of a person, as deputy-register, to a paper purporting to be a copy of an order obtained on an application as solicitor, declaring a marriage void, for the purpose of enabling the husband to impose upon the wife, and induce her to believe that she was legally divorced. For any deceit, practiced by the attorney as such, though not in a pending suit, he may be removed from office.³ But in the absence of professional impropriety, a court is not authorized to strike an attorney from the rolls because the grounds of any motion he may make are not supported by the facts. An attorney, by his admission as such, acquires rights of which he cannot be deprived at the mere caprice of a court, any more than a physician of the practice of his profession, a mechanic of the exercise of his trade, or a merchant of the pursuit of his avocations.⁴

That a counsellor practicing in a highest State court has been stricken from the rolls of the United States District Court for the State for a contempt, does not authorize the Supreme Court of the United States to refuse his admission. The Supreme Court of the United States does not consider the circumstances upon which the order of the district judge was given as within its cognizance, or that it is authorized to punish for a contempt which may have been committed in the district court.⁵

For any willful breach of professional obligation on the part of an attorney, the court has the power to strike from the rolls; and the court not only has the power, but it is its duty, when

¹ *Ex parte Kelly*, 62 N. Y. 198.

² *Ex parte Brown*, 2 Miss. 303.

³ *In re Peterson*, 3 Paige, 510.

⁴ *Fletcher v. Daingerfield*, 20 Cal. 430; *People v. Turner*, 1 Cal. 150. A record in a civil action for slander, showing that a plea charging an attorney with the commission of crime was found to be true, is not equivalent to showing a conviction of the offense. (*State v. Chapman*, 11 Ohio, 430; *Anon.* 2 Dowl. O. S. 110.)

⁵ *Ex parte Tillingbast*, 4 Peters, 108. See *People v. Hallett*, 1 Colo. 352.

a proper case is presented, to exercise it.¹ In cases where want of good character is the basis of the application, the character must be bad in such respects as shows the person unsafe and unfit to be intrusted with the powers of his profession.²

§ 81. Other instances of misconduct* authorizing suspension or disbaring.—Among the instances of misconduct, sufficient to authorize the court to suspend the attorney from practice, or strike his name from the rolls, are the following:

Wrongfully retaining and failing to pay over moneys collected;³ appearing for a defendant and confessing judgment without authority;⁴ not paying costs of an action brought without being retained;⁵ for deceit practiced officially, though not in a pending suit;⁶ for slanderous words not pertinent to the matter in question, uttered on trial or reference;⁷ commencing action without authority or consent.⁸ But not where notes instead of money have been taken by an attorney in satisfaction of a *fi. fa.*;⁹ nor for ignorance of the law.¹⁰ Letters written by a solicitor, and published in a newspaper, and tending to influence the result of a pending suit, have been considered a contempt of court.¹¹ Striking from the rolls is a personal matter,

¹ *People v. Barker*, 56 Ill. 299; *Emory v. Long*, 9 East, 481; 1 Mylne & K. 98; *Jackson v. French*, 3 Wend. 337; *Coveney v. Tannahill*, 1 Hill, 33; *Ex parte Burr*, 9 Wheat. 529; *Beene v. State*, 22 Ark. 157; *State v. Holding*, 1 McCord, 380; *Ex parte Brownell*, Cowp. 827; *Bryant's Case*, 4 Fost. 149; *Smith v. State*, 1 Verg. 228.

² *Baker v. Commonwealth*, 10 Bush, Ky. 592; *In re Percy*, 9 Tiffany, N. Y.; *Leigh's Case*, 1 Munf. 481; *People v. Turner*, 1 Cal. 190; *In re Mills*, 1 Mich. 394.

An order to suspend or remove an attorney for contempt should not be made where the offense is not of so gross or serious a nature as to render him unworthy of his office. (*Watson v. Savings Bank*, 5 Rich. 159—1873.)

³ *People v. Smith*, 3 Caines, 221; *People v. Wilson*, 5 Johns. 368; *Bohanan v. Peterson*, 9 Wend. 503; *Hynman v. Washington*, 2 McCord, 493; *Ex parte Ferguson*, 6 Cow. 569; 5 Paige, 311; 25 Miss. 129; 7 Blackf. 421.

⁴ *Denton v. Noyes*, 6 Johns. 296.

⁵ *Anon.* 2 Cowen, 589.

⁶ *In re Peterson*, 3 Paige, 510. An attorney stricken from the rolls for false recitals in a deed, no fraud being intended or effected, was restored on appeal. (*In re Stewart*, 2 Law R. P. C. 88.)

⁷ *In re —*, 7 Cowen, 725.

⁸ *In re Merritt*, 5 Paige, 125.

⁹ *Banks v. Cage*, 1 How. (Miss.) 292.

¹⁰ *Bryant's Case*, 4 Fost. (N. H.) 149.

¹¹ *Daw v. Eley*, 7 Law R. Eq. 49. As to disobedience of a rule for the payment of money, see *In re Ball*, 8 Law R. Com. P. 104.

and therefore an attorney cannot be thus punished for the default of his partner in collecting and converting the money of a client, without his knowledge or consent.¹ A publication calculated to injure the court, and referring to it in its official character, is a sufficient cause; but not where it is made as an editor and not as an attorney.²

Misconduct that would have prevented an attorney from being admitted is usually sufficient for his suspension from practice, at least for a limited period, as where an attorney, acting as clerk for a firm of attorneys, in completing the sale of certain property, received the balance of the purchase-money, which he appropriated to his own use, by his own confession. Although the misconduct was not considered strictly in a professional character, yet it was such as would have prevented him from being admitted an attorney, and the court suspended him from practice for twelve months.³

Where an attorney published advertisements without any signature, representing that he could procure divorces for causes not known to the law, without any publicity, and without reference to the residence of the parties, and by such advertisements solicited business of that character by communication through a particular post-office box, by its number: such conduct was held a cause for striking the attorney from the rolls, as calculated to bring reproach upon the profession.⁴

An attorney is subject to punishment for sending a letter, or threatening a prosecution, in order to extort money;⁵ appearing for a party without authority;⁶ pleading a sham plea;⁷ fraudulently altering the record;⁸ obtaining a rule or order on false, equivocal, or groundless suggestions;⁹ willfully or carelessly misleading the opposite party, in an action or suit, as to the address

¹ *Klingensmith v. Kepler*, 41 Ind. 341.

² *Ex parte Briggs*, 64 N. C. 202.

³ *In re Hill*, 3 Law J. Q. B. 543; *In re Blake*, 3 El. & E. 34; 30 Law J. Q. B. 32.

⁴ *In re Goodrich*, 79 Ill. 148; *In re Woolley*, 11 Bush, 95.

⁵ *Smith v. Gillett*, 3 Dowl. 364; *Rex v. Southerton*, 6 East, 143. See *Smith v. Tower*, 2 Dowl. 673; *In re Warren*, 1 Har. & W. 113.

⁶ 41 Edw. III, 1.

⁷ *Pierce v. Blake*, 2 Salk. 515; *Jenk.* 52; *Blewitt v. Marsden*, 10 East, 237; *Merington v. Beckett*, 2 Barn. & C. 81; *Fortescue v. Holt*, 1 Vent. 213.

⁸ *Ex parte Brown*, 1 How. (Miss.) 303.

⁹ *Clarke v. Gorman*, 3 Taunt. 492; *Rolfe v. Rogers*, 4 Taunt. 191.

of the client employing him;¹ taking an unfair advantage of the opposite party in an action in the absence of his professional adviser.²

An attorney may be stricken from the rolls for procuring a witness to keep out of the way;³ acting in an action or suit on both sides;⁴ fraudulently obtaining possession of property under color of process, or in any way abusing the process of the court;⁵ for conviction of felony or other serious crimes.⁶ The courts will also in lesser offenses call upon an attorney in his official capacity to answer affidavits containing charges against him as to matters intrusted to him in that capacity.⁷

As a good moral character is one of the constitutional and statutory qualifications essential to the admission of an attorney, so he may be removed whenever he ceases to possess such qualification.⁸ It is a good reason that the attorney has accepted a challenge to fight a duel, or that he has fought a duel in a sister State, and killed his antagonist. One reason may be that by the common law, independent of statute, it is murder for one to kill another in a duel.⁹ If an attorney obtains admission through fraud or deceit, he may be stricken from the rolls.¹⁰ Misconduct previous to admission has been rejected as insufficient to justify an attorney being struck from the roll, on the ground that the objection should come at the time of admission.¹¹

¹ *Neal v. Holden*, 3 Dowl. 493.

² *In re Oliver*, 2 Ad. & E. 629; 4 Nev. & M. 471; 1 Har. & W. 79.

³ *Stephens v. Hill*, 10 Mees. & W. 28; 1 Dowl. N. S. 669.

⁴ *Masais' Case*, 1 Keen, 74; *Berry v. Jenkins*, 3 Bing. 423.

⁵ 2 Inst. 215; *Wadworth v. Allen*, 1 Chit. 186. See, as to tampering with jurors as a cause for disbarring, *Turner v. St. John*, 3 Cold. 376.

⁶ *In re King*, 8 Q. B. 129; *In re Bromsall*, 2 Cowp. 829; *Rex v. Vaughan*, 1 Wils. 22; *Ex parte Frost*, 1 Chit. 558; *Rex v. Southerton*, 6 East, 142; *Anon.* 1 Chit. 557; *In re Howdom*, 9 Dowl. 970; *Anon.* 1 Dowl. 174.

⁷ *In re Knight*, Bing. 91; *Parker v. Marshall*, Lofft, 271; *Anon.* 22 Wend. 656; *In re Dakin*, 4 Hill, 42; *Thomas v. Roberts*, 5 Dana, 189; 3 Caines, 221; 5 Johns. 368; 9 Wend. 503; 6 Johns. 296; 4 N. H. 370.

⁸ *In re John Percy*, 36 N. Y. 651; *In re Peterson*, 3 Paige, 510; *Anon.* 22 Wend. 656; *People v. Palmer*, 61 Ill. 255; *Walker v. Commonwealth*, 8 Bush (Ky.) 86; *Dickinson v. Dustin*, 21 Mich. 561.

⁹ *Smith v. Tennessee*, 1 Yerg. 228; *State v. Fields*, 1 Mart. & Y. 70.

¹⁰ *Ex parte Hill*, 11 Law J. N. S. Ex. 329; 10 Mees. & W. 28; 1 Dowl. N. S. 669; *Anon.* 2 Barn. & Adol. 766; *Paget v. Chambers*, 7 Scott, 610; S. C. 5 Bing. N. C. 630.

¹¹ *In re Page*, 1 Bing. 160; 7 Moore, 572.

If an attorney disobeys a rule of court he is merely in contempt, and the proper course is to apply for an attachment against him. If he continues in contempt, the question may arise as to the propriety of his continuing any longer on the roll; but the court cannot at once, merely for contempt, compel him to show cause why he should not be disbarred.¹

As the court may proceed in a summary way to strike an attorney's name from the rolls for misconduct,² it has been done in one court on the production of a copy of the report of the master in another.³ But the proofs and contents of affidavits used in one court must be stated in the other, so that the court can see that the name was struck off for misdemeanor: so the Court of Common Pleas in England refused to strike an attorney off the rolls on the ground that he had not served a regular clerkship, and had misconducted himself previously to admission, the court intimating that to support the motion a case should have been made out of misconduct subsequent to admission.⁴

An attorney's name may be stricken from the rolls by the court in a summary proceeding, whether provided for by statute or not, as it is a duty which the court owes to the public.⁵ And this is done, not only as a punishment of the attorney, but as a measure necessary for the protection of the public.⁶ The court has power to require the attorney to purge himself upon oath of the imputed charge.⁷ The name of an attorney who has fought a duel may be stricken from the roll, although no statute provides for such a case, and although the attorney has not been convicted of the offense;⁸ a conviction of the crime charged is not necessary.

¹ *Ex parte Townley*, 3 Dowl. 40. See *Ex parte Burger*, 1 Dowl. N. S. 292; *Ex parte Grant*, 3 Dowl. 320.

² *Boyer v. Allen*, 2 Barnes R. 42; *Anon.* 6 Mod. 187; *Freem. Rep.* 74; 2 W. Black. 991.

³ *In re Smith*, 4 Moore, 319; 2 Brod. & B. 522.

⁴ *Ex parte Hague*, 3 Brod. & B. 257; 7 Moore, 64; *In re Page*, 1 Bing. 160; 7 Moore, 572.

⁵ *Mill's Case*, 1 Manning, 392; *Peterson's Case*, 3 Paige, 510; *Austin's Case*, 5 Rawle, 204; *Burr's Case*, 1 Wheel. C. C. 503; *Brown's Case*, 1 How. (Miss.) 303; *Rice v. Commonwealth*, 18 B. Mon. 472.

⁶ *Mills' Case*, 1 Manning, 392; *Peterson's Case*, 3 Page, 510; *Austin's Case*, 5 Rawle, 204.

⁷ *Attorney's License*, 1 Zab. 345.

⁸ *Smith v. Tennessee*, 1 Yerg. 228; *Cohen v. Wright*, 22 Cal. 324.

An attorney directed by the court to refund a sum of money, and who disobeys the direction and keeps out of the way, may be stricken from the rolls.¹ But the court will not strike from the rolls on account of an attorney's unfair play in gambling, after the relation of attorney and client between him and the applicant has ceased, the applicant having filed a bill in chancery respecting the promissory notes given by him in payment of the money won, and the matter being still pending.² Nor for publication of a libel, where a verdict has been obtained against the attorney for one shilling damages.³ Nor for commencing actions for the purpose of revenge.⁴ Nor generally where the affidavits on the application amount to a charge of indictable offenses.⁵ Nor for mere non-payment of money pursuant to an order or rule of court, the party being merely in contempt.⁶

Where a solicitor, who was the only person who acted professionally in a trust, induced his co-trustee, who was his client, improperly to sell out the trust fund, which was received by him and applied to his own use, on application of one of the *cestuis que trust* he was stricken from the rolls.⁷ And the same punishment was inflicted on an attorney who, without authority, instructed counsel to appear for parties interested in money in court, and to consent to its payment out of court.⁸

§ 82. Restoration.—If an attorney's name be stricken from the rolls for malpractice, he may afterward be re-admitted on motion, and on a proper showing. Striking from the rolls is not necessarily a perpetual disability; it is sometimes meant merely as a temporary punishment, and regarded in the light of a temporary suspension only. But the applicant for re-admission in such case must satisfy the court that he ought to be restored, and that

¹ Anon. 10 Jur. 198; 1 Dowl. & R. 529.

² Ex parte Stratford, 7 Jur. 412; 12 Law. J. Q. B. 231.

³ Anon. 2 D. P. C. 110.

⁴ Ex parte Warren, 1 Har. & W. 113; Smith v. Gillett, 3 D. P. C. 364; 3 Dowl. O. S. 364.

⁵ Anon. 5 Barn. & Adol. 1088.

⁶ Guilford v. Sims, 13 Com. B. 370.

⁷ In re Chandler, 22 Beav. 253; 2 Jur. N. S. 366; 25 Law J. Ch. 396.

⁸ In re Collins, 7 Deflex. M. & G. 558. A warrant of attorney given to prevent proceedings on a rule for striking an attorney off the roll, is void. (Kirwan v. Goodman, 9 D. P. C. 330; 5 Jur. 293.)

no objection to him remains. It appears to be a matter left, to a great extent, to the sound discretion of the court.¹ In a clear case of excess of jurisdiction, however, in an inferior court, mandamus will lie to restore an attorney's name to the roll.² In some States an appeal will lie from an order suspending an attorney from practice.³

If an attorney is stricken from the roll for a fraudulent misappropriation of moneys of a client, intrusted to him for investment, it should be made a condition precedent to his being restored, that he should make, or should have made, full restitution, or, at least, all in his power.⁴

§ 83. Practice.—The practice in the English and American courts is for the court to issue a rule upon the attorney, reciting the substance of the information or charges against him, and requiring him to show cause why he should not be stricken from the roll.⁵ The attorney must have notice and full opportunity to be heard in his defense. It is error to strike an attorney from the rolls on a mere motion, without giving him notice of the proceeding. And this is true, whether the court proceed under a statute, or in the exercise of its inherent powers.⁶ Specific and pertinent charges must be made and judgment entered on the process, otherwise he cannot be suspended or removed.⁷

¹ *Ex parte Frost*, 1 Chit. 558, note; *Rex v. Greenwood*, 1 W. Black, 222; 1 Johns. Cas. 181.

² *People v. Dowling*, 55 Barb. 197; S. C. 37 How. Pr. 394. See *post*, § 84.

³ *Winkelman v. People*, 50 Ill. 449.

⁴ *In re Poole*, 4 Law R. Comp. P. 350. See *Wright's Case*, 12 Com. B. N. S. 705; *Oldknow's Case*, 6 Best & Smith, 703; 34 Law J. Q. B. 121; *Robins' Case*, 34 Law J. Q. B. 121; *Chandler's Case*, 17 Beav. 475; *Pyke's Case*, 6 Best & Smith, 703; 34 Law J. Q. B. 121; *Anon.* 17 Beav. 475.

⁵ *Wharton on Agency*, sec. 557; *Wharton, Criminal Law*, 7th ed. sec. 3430; *In re King*, 8 Q. B. 129; *In re Palmer*, 1 Har. & W. 55; *Ex parte Townley*, 3 Dowl. 40; *Ex parte Grant*, 3 Dowl. 320; *Ex parte Mills*, 1 Mich. 392; *Ex parte Percy*, 36 N. Y. 651; *Paul v. Purcell*, 1 Browne (Pa.) 348; *United States v. Porter*, 2 Cranch, 60; *Perry v. State*, 3 Iowa, 550; *Rice v. Commonwealth*, 18 B. Mon. 472; *Ex parte Brown*, 2 Miss. 303; *State v. Holding*, 1 McCord (S. C.) 379; *Smith v. State*, 1 Yerg. 228; *Baker v. Commonwealth*, 10 Bush, 592; *Gehrke v. Jod*, 59 Mo. 522; *Beene v. State*, 22 Ark. 157; *Ex parte Brown*, 1 How. (Miss.) 303; *Ohio v. Chapman*, 11 Ohio, 430.

⁶ *Ex parte Heyfron*, 7 How. (8 Miss.) 127; *Saxton v. Stowell*, 11 Paige Ch. 526; *Beene v. State*, 22 Ark. 149; *Walker v. Commonwealth*, 8 Bush (Ky.) 86; *Dickinson v. Dustin*, 21 Mich. 561.

⁷ *Wharton on Agency*, sec. 557; *Withers v. State*, 36 Ala. 252; *State v. Start*, 7 Iowa, 499; *State v. Watkins*, 3 Mo. 388; *Beene v. State*, 22 Ark. 149; *Ex parte*

Charges against an attorney, with a view to his suspension or removal, must be proved by a clear preponderance of evidence.¹

The charges and accusations must be clear, specific, and circumstantial, that the attorney may know how to defend. General and vague charges are not sufficient. A specification that an attorney "took legal papers belonging to the files of the court" is too indefinite as a charge. The time must be stated, and the title of the cause should be given. A charge so grave in its nature, and possibly leading to such serious results, must be stated with great particularity.² Accordingly it has been held that a charge that an attorney was in the habit of encouraging the commencement and prosecution of actions for the mere purpose of promoting his own personal ends and interests, and stirring up and exciting disputes and lawsuits amongst his neighbors and the citizens of the county and neighborhood in which the party making the motion lived, is not a sufficient specification. It should state the particular case or cases in which the attorney has violated his duties, and the particular acts, so that the attorney may prepare his defense.³

Full time to answer must be given the attorney,⁴ and the application will not be granted when the charge amounts to an indictable offense, for attorneys cannot, more than other persons,

Bryant, 24 N. H. 149; Commonwealth v. Newton, 1 Grant, 453; Fisher's Case, 6 Leigh, 619; Saxton v. Stowell, 11 Paige, 526; People v. Harvey, 41 Ill. 277. As to when attorney will not be disbarred, see Fletcher v. Daingerfield, 20 Cal. 427; State v. Kirk, 12 Fla. 278; Perry v. State, 3 Iowa, 550; State v. Foreman, 3 Mo. 602; State v. Chapman, 11 Ohio, 430; Jackson v. State, 21 Tex. 668.

¹ People v. Barker, 56 Ill. 299. See generally, when evidence not sufficient to disbar, Walker v. State, 4 W. Va. 749; Kane v. Haywood, 66 N. C. 1; Barker's Case, 49 N. H. 195.

² People v. Allison, 68 Ill. 151; Dickinson v. Dustin, 21 Mich. 561; Florida v. Kirke, 12 Fla. 273; Fletcher v. Daingerfield, 20 Cal. 427; Walker v. Commonwealth, 8 Bush (Ky.) 86; Ex parte Smith, 28 Ind. 47; Ex parte Brown, 2 Miss. 303.

³ Reilly v. Cavanaugh, 32 Ind. 214. In Indiana, the attorney against whom the motion to suspend is made is authorized by statute to demand that the issues formed shall be tried by a jury. The attorney may be suspended and a judgment rendered against him for the amount of money withheld by him. (Reilly v. Cavanaugh, 32 Ind. 214; Sec. 778 Code.)

⁴ Baily v. Jones, 1 Chit. 744; Cass v. Nibbett, Ibid. 745; Denton v. Noyes, 6 Johns. 296; 10 Paige, 352; 11 Ibid. 526; Anon. 22 Wend. 656; 6 Leigh, 619; Ex parte Heyfron, 7 How. (Miss.) 127. It is error to strike from the rolls without some notice. (Ex parte Heyfron, *supra*; In re Percy, 36 N. Y. 651; In re Peterson, 3 Paige, 510; Jackson v. State, 21 Tex. 668.)

be called on to criminate themselves,¹ but in answering the affidavits, it is not sufficient merely to deny the charges, but it is incumbent to explain the transaction to which it relates.²

A charge made against an attorney for the purpose of removing him, that he is of notoriously bad character, not to be believed under oath, and unworthy to practice as an attorney, is too general. But a charge that the reputation of an attorney for truth and veracity is so notoriously bad that he is not to be believed under oath, contains good cause for removal, and seems not to be too general.³

A charge that the attorney had in his hands money belonging to the party making the motion and another person, collected by him as their attorney in a certain cause, tried in a certain court, at a term specified, mentioning the amount so collected for each, and thus withheld, which said attorney refused to pay to them on demand or in any manner account for, has been held sufficiently specific on demurrer.

An accusation that an attorney destroyed, as far as he could, the respect due the court, by insulting language to the judge while officially occupied—that he disobeyed an official order of the court—should specify the manner in which the court was treated disrespectfully. If it was done by insulting language, the words used by the accused should be given; if by disrespectful acts, those acts should be described, so that the accused may know what words or acts he is required to defend. Such an accusation should also show what order the accused disobeyed.

The finding or judgment also should specify the particular charge or charges upon which an attorney's guilt is pronounced. Where evidence against an attorney tends to establish only two or three of the charges against him, and leaves the other charges without any proof, a judgment goes too far which finds him "guilty of the charges in said accusation."⁴

¹ *Knight v. Hall*, 1 Bing. 142; *Short v. Pratt*, Ibid. 102; *Robertson v. Mills*, 1 Dowl. N. S. 727; *Stephens v. Hill*, Ibid. 669; 10 Mees. & W. 28; 11 Law J. N. S. Ex. 329; *Anonymous*, 2 Halt. 162; *Ex parte Burr*, 9 Wheat. 529.

² *In re Crossley*, 6 T. R. 701.

³ *In re Mills*, 1 Mich. 392; *Ex parte Brownsall*, Cowp. 829; *King v. Southerton*, 6 East, 127; *Smith's Case*, 1 Brod. & B. 522; *Leigh's Case*, 1 Munf. Va. 481.

⁴ *Perry v. State*, 3 Greene, 550. When an attorney is charged with malpractice, or offenses not committed within the presence and personal knowledge of the

A court cannot, when rendering a judgment of suspension against an attorney, adjudge him infamous. No court can adjudge any man, whether counsellor or layman, infamous. It is true, infamy may attach to a conviction of certain public offenses, but it is the law, and not the court, which fixes the taint. The court only pronounces the judgment which the law authorizes, and the infamy follows. But this is a very different thing from a court or judge undertaking, where no felony is charged, or indictment found, or trial had, to fix upon an officer of the court, or upon any other person, the charge of being infamous. No such power belongs to any court, or to any judge.¹

A record of conviction for a contempt of court, punished summarily, may possibly be comprehended in the single order and judgment. But where an attorney is tried for any other misconduct, it can only be done upon specific charges, and an opportunity to be heard upon them, so that there may be a full defense; and an appellate court can, if resorted to, determine their legal sufficiency. The judgment and hearing should be, as in other cases, upon the particular charges the attorney is called upon to answer. A mere entry upon the minutes seems not to be sufficient; nor would such an entry be sufficient to be the basis of the impeachment of an attorney's testimony as a witness, under the rule that he could only be attacked by record evidence of his conviction, even if it recited a confession on the part of the attorney, and thereupon his name was stricken from the rolls.² The courts cannot act upon a motion, and supersede the license of an attorney, except upon proof of the conviction

court, the correct mode of proceeding against him is by complaint or information made on the oath of some individual. As in other cases, specific charges must be made. (*Walker v. Commonwealth*, 8 Bush, 86; *Dickinson v. Dustin*, 21 Mich. 561.) When an attorney is guilty of malpractice within the presence and personal knowledge of the court, the judge may proceed on his own motion, and order a rule to show cause against the attorney. (*Ibid.*) All cases must be clear and free from doubt, not only as to the act charged, but as to the motive. (*People v. Harvey*, 41 Ill. 277.)

¹ *Fletcher v. Daingerfield*, 20 Cal. 430. A judgment disbarring an attorney for contempt cannot be attacked collaterally, as in a proceeding in the nature of an information, for attempting to practice law without a license. (*Smith v. State*, 5 Tex. 581.)

² *Dickinson v. Dustin*, 21 Mich. 561; *Ex parte Bradley*, 7 Wall. 364.

of the accused by a court of competent jurisdiction, when the basis of the motion is a criminal offense.¹

Corrupt and fraudulent conduct is a sufficient ground for the suspension or removal of an attorney from office, but ignorance of the law is not. For mistakes, the attorney may be answerable in damages, but should not be stricken from the rolls.²

It is the duty of the court to cause charges to be preferred against an attorney whenever it is satisfied, from what has occurred in its presence, or from any satisfactory proof, that a case exists where the public good and the ends of justice require it.

If the attorney charged is an officer of the court to which the application is made, a summary jurisdiction will be exercised when he is guilty of misconduct, if he acted in the capacity of an attorney, although it did not arise in any action or suit.³

The proper practice, in applications to strike an attorney's name from the rolls, is to apply to the court, and support the application by affidavits setting forth, directly, positively, and specifically, the misconduct complained of, and not merely the bare facts unsupported by any imputation by the party making the affidavit.⁴ The application must be made so as to enable the party complained against to show cause, or answer the matters of the affidavits on which the application against him is made.⁵ The precise cause should appear in the order of suspension.⁶ The name may be stricken from the roll without the intervention of a jury.⁷ The charge should be verified.⁸ The attorney must have full notice of the application by personal service.⁹

¹ *State v. Robinson*, 26 Tex. 367.

² *Bryant's Case*, 24 N. H. 149.

³ *In re Cresswell*, 1 Jur. 755; *In re Peterson*, 3 Paige Ch. 510; *In re Knight*, 1 Bing. 91. See, as to power of judge at chambers to administer this punishment, *Ex parte Higgs*, 1 Dowl. 495; *Wilson v. Northrop*, 4 Dowl. 441; 4 Bing. N. C. 122; 5 Scott, 414.

⁴ *In re King*, 3 Nev. & M. 716.

⁵ *Ex parte —*, 2 Dowl. 227.

⁶ *State v. Watkins*, 3 Miss. 388. See, as to form of order and commitment, *People v. Nevins*, 1 Hill, 151.

⁷ *Smith v. State*, 1 Yerg. 228.

⁸ *Ex parte Burr*, 9 Wheat. 529.

⁹ *Ex parte Heyfron*, 7 How. (Miss.) 127; *Fisher's Case*, 6 Leigh, 619. See *Jones v. Miller*, 1 Swan, 151; *In re Peyton*, 12 Kans. 398; *Florida v. Kirke*, 12 Fla. 273; *Fletcher v. Daingerfield*, 20 Cal. 430; *Ex parte Smith*, 28 Ind. 47; *Ex parte Brown*, 2 Miss. 303.

Where an attorney has been suspended from one of the superior courts of Westminster, in England, for misconduct, he may be suspended by other superior courts for a like period, or until the further order of the court, upon an affidavit of the fact and an affidavit of identification. Copies of papers must be furnished. A rule *nisi* is usually granted.¹

When the summary jurisdiction of the court is invoked against an attorney, it does not appear to be necessary that in the morning papers it should be alleged that he is an attorney of the court in which the application is made, inasmuch as all courts take judicial notice of their own officers;² but the fact is often stated, and if the party be not an attorney of the court, it should distinctly appear that he acted as such in the premises,³ or that he is in some way subject to the jurisdiction of the court, as by means of a previous adverse order, which has been disobeyed.⁴ Merely acting as agent of another attorney, and receiving money, is not sufficient.

§ 84. Whether mandamus will lie.—In a California case the proceedings of the lower court were irregular. The court said: "If the proceedings are void, the relators would have their action for damages, if interrupted or deprived of the privileges and emoluments conferred by the license; but this, if a remedy at all, would be too uncertain, and subject the party to great delay. We see no other remedy in such cases than that which is afforded by the writ of mandamus. Blackstone, in his Commentaries, says that this writ "may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office." The courts of the several States make frequent use of this writ in restoring to office incumbents who have been illegally ousted. It lies to inferior courts to restore an attorney removed by

¹ In re M. T. 8 Law R. Ex. 62; In re Turner, 8 Law R. Com. P. 103; 23 and 24 Vict. chap. 127, sec. 25.

² Ex parte Hodges, 1 Jur. 933; People v. Nevins, 1 Hill, 154; Ex parte King, 3 Dowl. 41. See Ex parte Hare, Ibid. 600; 1 Har. & W. 211.

³ Cole v. Grove, 1 Scott N. S. 30; 4 Jur. 339; In re Lord, 2 Scott, 131; Thompson v. Gordon, 15 Mees. & W.; 4 Dowl. & L. 775. See Sharp v. Hawker, 3 Scott, 396; 3 Bing. N. C. 66; Fryer v. Smith, 6 Dowl. 299.

⁴ Downton v. Styles, 6 Dowl. 189.

them." An alternative writ of mandamus was ordered, commanding the judge below to cause to be vacated the order of expulsion entered on the records, and to permit them to practice in all the courts, or show cause why the same should not be done.¹

§ 85. Defects in articles, etc.—Under the English system, and by statute, no person who has been admitted and enrolled will be liable to be struck from the rolls for or on account of any defect in the articles of clerkship, or in the registry thereof, or in his service under such articles, or in his admission and enrollment, unless the application for striking him off the roll is made within twelve months from the time of his admission and enrollment, provided the articles, registration, service, admission, or enrollment are without fraud. A motion to strike from the rolls on the ground of misconduct, and the want of regular service in his clerkship, comes too late when the party has been admitted for three years and a half.² But an attorney who has been admitted fraudulently will be struck from the rolls, and the court will grant an attachment against the parties concerned in the fraud.³

On an affidavit imputing criminal conduct to an attorney, the form of the rule in the first instance is to show cause why he should not be struck off the roll, or be suspended from practice for so long a time as the court shall think fit.⁴ The rule must be personally served.⁵ The affidavit may be entitled in the cause, although judgment has been obtained in it.⁶

¹ *People v. Turner*, 1 Cal. 190; *People v. Fletcher*, 2 Scam. 486; Breese, 25; 6 Mass. 462; 20 Pick. 484. As the admission of an attorney is a judicial act, and not ministerial, it has been held, for that reason, that it is not the subject of mandamus. (*Commonwealth v. Brackenridge*, 1 Serg. & R. 187.) That mandamus is improper, and that *certiorari* in the nature of a writ of error will lie where there is no appeal, see *Ex parte Briggs*, 64 N. C. 202; *In re Randall*, 11 Allen, 473. That appeals will lie from orders suspending attorneys, see *Winkelman v. People*, 50 Ill. 449; *Turner v. Commonwealth*, 2 Met. (Ky.) 619. But as supporting the action of the California court, as mentioned in the text, see *ante*, § 80, and cases there cited.

² Anon. 2 Barn. & Ad. 766; 6 and 7 Vict. chap. 73, sec. 29.

³ *Ex parte Hill*, 2 W. Black. 991. Striking from rolls for non-payment of stamp duty, see *In re Myers*, 8 Q. B. 515; 10 Jur. 563; 15 Law J. Q. B. 209.

⁴ Anon. 11 Week. R. 68; 7 L. T. N. S. 716; *In re Wright*, 1 Ex. 658; 5 Dowl. & L. 394; 12 Jur. 20; 17 L. T. Ex. 128.

⁵ Anon. 1 Car. Law Rep. 481; 23 Law J. Ex. 24.

⁶ *Stephens v. Hill*, 10 Mees. & W. 28; 1 Dowl. N. S. 669; 6 Jur. 585; *Ex parte*

§ 86. Barratry.—There are certain offenses which properly belong to the domain of criminal law, but which will be briefly noticed here: first, because they sometimes concern attorneys; and second, when committed by attorneys, may, in addition to the punishment meted out by the common law or by statute, authorize the court to exercise its summary powers, and strike the attorney's name from the rolls. Reference is made to the offenses of barratry, champerty, and maintenance.

Common barratry is the offense of frequently exciting and stirring up suits and quarrels, either at law or otherwise. The element of frequency is essential, as a man cannot be guilty of barratry in respect of a single act.¹ The indictment must charge the offender with being a "common barrator," and it has been held that at least three instances must be shown.² The offense is a common-law misdemeanor, punishable by fine and imprisonment, at the discretion of the court, and in case the offender be an attorney, by suspension from practice.

It was enacted in England by the 12 Geo. I, chap. 29, (made perpetual by the 30 and 31 Vict., chap. 59) that if any one who has been convicted of forgery, perjury, subornation of perjury, or common barratry, shall practice as an attorney, solicitor, or agent in any suit, the court, upon complaint, shall examine it in a summary way; and if proved, the offender is punishable by penal servitude for a period not exceeding seven nor less than five years.

§ 87. Maintenance is an offense that bears a near relation to barratry. It is an officious intermeddling in a suit that in

Caine, 4 Jur. 220. See, as to offenses of attorneys' clerks in England, and the master's liability therefor, *Dunkley v. Ferris*, 11 Com. B. 457; *Matthews v. Livesley*, 11 Ex. 221; 3 Car. Law Rep. 898; 1 Jur. N. S. 601; 24 Law Jur. Ex. 252; *Whitfield v. Moojen*, 1 Fost. & F. 290; *Cornelius v. Harrison*, 2 Fost. & F. 758. Practicing while in prison, see 6 and 7 Vict. chap. 14, sec. 31; *In re Williams*, 28 Beav. 465; 6 Jur. N. S. 908. See generally: *Burton v. Chesterfield*, 9 Jur. 373; *In re Smith*, 1 El. & B. 414; 17 Jur. 114; 22 Law J. Q. B. 123; *In re Collins*, 18 Com. B. 272; *In re Hall*, 2 Jur. N. S. 1233; *In re Thompson*, 7 L. T. N. S. 327; 13 Com. B. N. S. 288.

¹ Hawk. P. C. book 1, chap. 81, sec. 5; 1 Hawk. P. C. 243, 244; 4 Blackst. Com. 149; *Commonwealth v. Tubbs*, 1 Cush. 2; *Commonwealth v. McCulloch*, 15 Ibid. 227; *Commonwealth v. Davis*, 11 Pick. 432; *State v. Chitty*, 1 Bail. 379.

² *State v. Chitty*, *supra*; 1 Hawk. P. C. 244.

no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it.¹

A man, however, may maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity. Otherwise the punishment, by the common law, was fine and imprisonment, and by the English statute, 32 Henry VIII, chap. 9, a forfeiture of a certain amount of money.²

The doctrine of maintenance is founded upon the principle that combinations against individuals are dangerous in themselves and prejudicial to the public interests. It is no wrong for an individual to prosecute his rights against another in the courts, but it is criminal for others to maintain him in his suit, and for the reason that maintenance leads to oppression.³

Numerous American cases declare that assisting another with money or advice to carry on his cause is an indictable offense, unless the person thus maintaining has some interest in the subject of the suit, or is connected with the suitor in some social relation.⁴ In some States, however, maintenance is not recognized as an offense.⁵

It is not maintenance, in the criminal sense of the word, if an attorney expends his own money for his client, to be repaid;⁶ nor if a lessor pays fees or maintains the suit for his lessee in ejectment;⁷ nor if a mortgagee, not a party to the suit, advances money to support the title;⁸ nor if an attorney take security of a stranger for past fees.⁹ But if the attorney of a party gives or promises any money to the jury, it is maintenance.¹⁰

¹ 2 Inst. 484-564; 1 Hawk. P. C. 249, 255; 4 Blackst. Com. *149, 134, 135; 1 Rich. II, chap. 4, 321; 4 Blackst. Com. 149; *Perine v. Dunn*, 3 Johns. Ch. 508; *Bristol v. Dann*, 12 Wend. 142.

² 1 Edw. III, chap. 14; 20 Ibid. chap. 14; 1 Rich. II, chap. 4.

³ *Lambert v. People*, 9 Cowen, 578, 600; *Lathrop v. Bank*, 9 Met. (Mass.) 489, 492; *Rush v. Larue*, 4 Litt. 411; *Thalhimer v. Brinckerhoff*, 3 Cowen, 623.

⁴ *Campbell v. Jones*, 4 Wend. 306; *Lathrop v. Bank*, 9 Met. 489; *Wickham v. Conklin*, 8 Johns. 20; *Cummins v. Fuller*, 4 T. B. Mon. 97; *Knight v. Sawin*, 6 Greenl. 361; *Godspeed v. Fuller*, 46 Me. 141; *Williamson v. Sammons*, 34 Ala. 691; *McCall v. Copehart*, 20 Ala. 521.

⁵ As in California—*Matthewson v. Fitch*, 22 Cal. 86.

⁶ 2 Inst. 484, 564; 1 Hawk. P. C. chap. 27, secs. 29, 30.

⁷ 2 Rol. 181.

⁸ *Sharp v. Carter*, 3 P. Wms. 375.

⁹ *Pearson v. Humes*, Cart. 230.

¹⁰ 13 Henry IV, 16 b. 17.

The offense is now generally reached by the summary jurisdiction which the courts exercise over attorneys, as officers of the court, in case of malpractice. Deeds and instruments of a champertous nature have been often set aside by the courts.¹

§ 88. Champerty (*campi partitio*) is a species of maintenance, and punished usually in the same manner, being a bargain with a plaintiff or defendant, *campum partire*, to divide the land, or other matter sued for, between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense.² It is the virtual purchasing of a suit, or right of suing. So if an attorney prosecute an action, to be paid his costs by a gross sum commensurate with his trouble, and with the benefit obtained, this is said to be champertous.³

Champerty, like maintenance, is indictable at common law. The offense consists in the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or some profits out of it; and it covers all transactions and contracts, whether by counsel or others, to have the whole or part of the thing, or damages recovered.⁴ The offense may be committed although no suit has actually been commenced.⁵ The agreement, moreover, between the client and attorney, if champertous, is void.⁶ In New York, and some other States, the laws of maintenance and champerty are not in force except as regulated by statute, and in other States the matter is not even regulated by statute.⁷

¹ *Stevens v. Bagwell*, 15 Ves. 139; *Wood v. Dawes*, 18 Ves. 128; *Wood v. Griffith*, 1 Swanst. 56; *Williams v. Protheral*, 5 Bing. 309; 3 Young. & J. 129. See *Tisdale v. Bedington*, Noy, 168; Cro. Eliz. 594; *Box v. Barnaby*, Hob. 117; *Skapholm v. Hart*, 15 Vin. Abr. 171; Com. Dig. tit. Attorney and Maintenance.

² 1 Hawk. P. C. 257; 33 Edw. I.

³ *Earle v. Hopwood*, 9 Com. B. N. S. 566.

Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it, whereupon the champertor is to carry on the party's suit at his own expense. (1 Hawks. P. C. chaps. 83, 84; 4 Blackst. Com. 135; *Stanley v. Jones*, 7 Bing. 349; *Thalimer v. Brinkerhoff*, 20 Johns. 386; *Stanton v. Haskin*, 1 McArthur, 561.)

⁴ *Lathrop v. Bank*, 9 Met. 489; *Holloway v. Lowe*, 7 Port. 488; *Brown v. Beauchamp*, 5 T. B. Mon. 416; *Thurston v. Percival*, 1 Pick. 416; *Barns v. Strong*, 1 Jones' Eq. 100; *Wheeler v. Pounds*, 24 Ala. 472; *Douglass v. Wood*, 1 Swan, 393.

⁵ *Rust v. Larue*, 4 Litt. 411; *Martin v. Amos*, 13 Ired. 201.

⁶ Cases cited *supra*. Also *Holloway v. Lowe*, 7 Port. 488; *Byrd v. Odem*, 9 Ala. 755; *Key v. Vattier*, 1 Ohio, 132; *Scoby v. Ross*, 13 Ind. 117.

⁷ *Sedgwick v. Stanton*, 14 N. Y. 289; *Voohies v. Dorr*, 51 Barb. 580; *Lowe v.*

The strictness which formerly prevailed in the common-law doctrine of champerty has been considerably relaxed by modern decisions. An action can now be commenced in many of the States of the Union for contingent fees.¹ But as modified it still prevails. So, where attorneys agreed to conduct litigation for the recovery of lands for one-third of the land or money recovered, the bargain for one-third of the land was held champertous and void. The contingent fees allowable must be, the court said, as a measure of compensation, not as a part of the property in controversy.²

To constitute champerty, there should be some undertaking disclosed or implied, on the part of one, to carry on the suit at his own expense, or to look alone to that which might be recovered for his compensation. The pay must be dependent on success, which is the important element deemed prejudicial to the public repose, and therefore declared illegal.³

Nor is a contract champertous if it appears to be nothing more than a mode adopted for giving the plaintiff a lien on a portion of the debt claimed to be due, as security for his services and disbursements. The fact, therefore, that the services of an attorney were rendered under an agreement, by his client, to give or allow and pay him the first fifty dollars collected by him therein, is no defense, either at common law or by statute, to an action by the attorney for services rendered in the suit.⁴

Wherever champerty is considered an offense, either at the common law or by the English statutes, and when so considered, it avoids every contract into which it enters. A contract between an attorney and a client, that the attorney shall prosecute a claim at his own cost, and charge for a part of the subject in litigation, is champertous, illegal, and void.⁵ It has been said

Hutchinson, 37 Me. 196; Newkirk v. Cone, 18 Ill. 449; Stoddard v. Mix, 14 Conn. 12; Davis v. Sharron, 15 B. Mon. 64; Mullen v. Guest, 6 Tex. 275; Danforth v. Streeter, 28 Vt. 490; Wright v. Meek, 3 Greene, 472; Key v. Vattier, 1 Ohio, 132.

¹ Stanley v. Jones, 7 Bing. 349; Thalimer v. Brukerhoff, 20 Johns. 386; Stanton v. Haskin, 1 McAr. 561; Stanton v. Haskin, *supra*; Child v. Trist, 1 McAr. 1.

² Ibid.

³ 1 Hawk. P. C. chaps. 83, 84; 4 Blackst. Com. 135.

⁴ Scott v. Harmon, 109 Mass. 237; S. C. 12 Am. R. 685; Thurston v. Percival, 1 Pick. 415. See Allen v. Hawks, 13 Pick. 79.

⁵ Martin v. Clarke, 8 R. I. 389; S. C. 5 Am. R. 586; 4 Blackst. Com. 135; Story, Equity Jurisprudence, sec. 1048.

to be not merely *malum prohibitum*, but *malum in se*.¹ Tindall, C. J., considered the principle upon which it rests as not confined to the common law of England, but that champerty was considered in the earliest times, and in all countries, as an offense of great mischief to the public.² So Chancellor Kent remarks that "the statutes of champerty are founded on a principle common to the law of all well-governed countries, that no encouragement shall be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." The Statute of Westminster I was brought over by the colonists, and became a part of the American common law.

§ 89. Striking from the rolls at attorney's own request.

An attorney might, under the English system, on motion based on an affidavit, be struck off the roll at his own instance. The affidavit stated the reasons, as for the purpose of being called to the bar, or to take holy orders; it also stated that no application or other proceeding was pending nor likely to be commenced against him, having the same object in view; if there should be such a proceeding pending, the motion will not be granted.³

An attorney, whose name was stricken from the roll at his own request, was re-admitted fifteen years afterward, without paying arrears of duty or penalty.⁴ But if an attorney has his name stricken from the rolls at his own instance, and is then called to the bar, it appears that he cannot again be placed on the roll of attorneys, there being no instance of a barrister being admitted an attorney. He must first be disbarred.⁵

Although an attorney may be stricken from the rolls on his own request and on his own motion, yet he cannot be, although he may never have practiced, until he makes an affidavit that no proceedings are pending against him for misconduct,⁶ and that

¹ Willer v. Duke of Portland, 3 Ves. 494.

² Stanley v. Jones, 7 Bing. 369; Welles v. Middleton, 1 Cox. 125; Martin v. Clarke, *supra*.

³ Anon. 1 Chit. 557n; Ex parte Owen, 6 Ves. 11; Ex parte Foley, 8 Ves. 33. See Ex parte Smith, 1 Chit. 692; People v. Walbridge, 6 Cowen, 516.

⁴ Ex parte Calland, 2 Barn. & Ald. 315n.

⁵ See Moody's Case, Barnes, 42; Doug. 14.

⁶ Anon. 1 Chitt. 557.

he expects none.¹ Some cases hold that the affidavit need not state for what purpose he wishes to be struck from the roll; others hold that it must.² The attorney so struck from the roll may be re-admitted upon application, and satisfying the court by affidavit of the propriety of his re-admission.³

By the 23 and 24 Vict., chap. 127, sec. 25, the name of every person struck off the roll of attorneys of the superior courts by the rule of such courts, or off the roll of solicitors of the Court of Chancery by order of any judge of that court, shall, upon production of an office copy of the rule or order, and an affidavit of the identity of the person named in it, to the proper officer of any other of the said courts of which such person is an attorney or solicitor, be struck off the roll of such court, and in case any such person be at any time thereafter restored to the roll by rule or order of the said courts, he shall, upon production of an office copy of the rule or order so restoring him, with an affidavit of the identity of the person named therein, to the proper officer of the court, be restored to the roll thereof without payment of any fee or fine whatsoever.

§ 90. Responsibility of the judiciary in civil actions for acts done judicially, as striking from the rolls.—In *Bradley v. Fisher*, in the Supreme Court of the United States,⁴ it appeared that the plaintiff was a member of the bar of the supreme court of the District of Columbia, and the defendant was one of the justices of that court. The plaintiff had been one of the counsel for the defense in a criminal cause pending before the defendant as judge, and immediately upon the discharge of the jury in the cause, the court, held by defendant, directed an order to be entered on its records striking the name of the plaintiff from the roll of attorneys practicing in that court. The order was accompanied by a recital, that during the progress of the trial, immediately after the court had taken a recess for the day, as

¹ *Ex parte Gray*, 9 D. P. C. 336; 5 Jur. 25.

² *Ex parte Charnock*, 3 London Jurist, 23; *Anon.* 1 *Ibid.* 104; *Ex parte Bur-rill*, 11 Jur. 1062.

³ *Ex parte Cole*, Doug. 114; *Ex parte Smith*, 1 Chit. 692. See, as to another person making the affidavit for the attorney, *In re Sturdy*, 2 Jur. N. S. 452. See, as to amending the affidavit, *In re Simpson*, 1 Com. B. N. S. 554.

⁴ *Bradley v. Fisher*, 13 Wall. 335; *Ex parte Bradley*, 7 Wall. 364.

the presiding judge was descending from the bench, he had been accosted in a rude and insulting manner by the plaintiff, charging him with having offered the plaintiff a series of insults from the bench from the commencement of the trial; that the judge had then disclaimed any intention of passing any insult whatever, and had assured the plaintiff that he entertained for him no other feelings than those of respect; but that the plaintiff, so far from accepting this explanation or disclaimer, had threatened the judge with personal chastisement. The action was for damages for the conduct of the defendant, whereby the plaintiff was deprived of his right to practice as an attorney in that court.

Several points were raised and discussed, based upon the constitution of the courts, and of a technical character; but it was also distinctly set up, by special plea, that the order was made in the lawful exercise and performance of his authority and duty as presiding justice, for the official misconduct of the plaintiff as one of its attorneys, and in the presence of the court. In other words, it set up that the order was a judicial act; and it was held that, if such were the character of the act and the jurisdiction of the court, the defendant could not be subjected to responsibility for it in a civil action, however erroneous the act might have been, or however injurious in its consequences it proved to the plaintiff. "For," said the court,¹ "it is a general principle of the highest importance to the proper administration of justice, that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility."²

"The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions,

¹ Per Field, J.

² Justice Mayne in *Taaffe v. Downes*, 3 Moore P. C. C. 41*n*.

obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, 'a deep root in the common law.'¹

"Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of *Floyd v. Barker*,² reported by Coke in 1608, where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption, impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise it would tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations."

"The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies, involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence, and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often creates in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. * * If civil actions could be maintained in such cases against the judge because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts, would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

¹ *Yates v. Lansing*, 5 Johns. 291.

² 12 Coke, 25.

"If, upon such allegations, a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held answerable by the losing party."¹

Nor will it avail that the act be alleged to be done maliciously and corruptly;² nor that it is in excess of jurisdiction.

The judges of the superior courts in America are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the trusts of their office. If, in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment, and suspended or removed from office. In some States they may be thus suspended or removed without impeachment, by a vote of the two houses of the legislature. As already stated, it makes no difference that the act is in *excess* of jurisdiction; for whether it is or not, may be a matter itself to be determined judicially; but the case is different where there is a clear usurpation of power, and no jurisdiction whatever exists, and this is known to the judge; as if a probate court, invested only with authority over the estates of deceased persons, should proceed to try parties for public offenses.³

§ 91. Compelling disclosure as to abode or occupation of client—Requiring attorney to produce client.—An at-

¹ *Bradley v. Fisher*, 13 Wall. 335, per Field, J.; *Pratt v. Gardner*, 2 Cush. 68, per Shaw, C. J.; *Fray v. Blackburn*, 3 Best & Smith, 576; *Scott v. Stansfield*, 3 Law R. Ex. 220; *Randall v. Brigham*, 7 Wall. 523.

² *Ibid.*

³ Cases cited *supra*, and also *Ackerly v. Parkinson*, 3 Maule & S. 411; *Calder v. Halket*, 3 Moore P. C. C. 28.

torney will not be compelled to disclose the whereabouts of his client if the applicant avows or threatens that he seeks the information for the purpose of effecting an arrest on a criminal charge.¹ But a court or judge may compel an attorney to disclose the place of abode of his client, notwithstanding that one object of the applicant in requiring the information is that he may be enabled to arrest the plaintiff under a writ of attachment.² Before an attachment will be issued to compel an attorney to disclose his client's residence, it must be shown that a demand in writing was duly made.³ There is no obligation on an attorney to produce his client for the purpose of being served with process by a third person.⁴

§ 92. Delivery up of documents.—The court will not exercise its summary jurisdiction over attorneys to compel them to deliver up papers on which they have a lien for a balance of a bill of costs, and this, although an offer is made to pay the amount into court, subject to the verdict of a jury;⁵ but the lien must be that of the attorney, and not of a third party.⁶ Nor will the court compel an attorney to deliver up a deed where he holds it as a party or trustee.⁷ But the court ordered an attorney, who held a deed as trustee, to deliver the draft of it to the *cestui que trust*, who had paid for the deed and draft.⁸

§ 93. Papers in attorney's hands for professional purposes.—An attorney is not entitled to retain drafts and copies of original deeds for which his client has paid, and if he refuses

¹ *Harris v. Holler*, 12 Law J. Q. B. 62.

² *Cox v. Bockett*, 11 Jur. N. S. 88; 34 Law J. C. P. 125; 13 Week. R. 292; 11 L. T. N. S. 629.

³ *Brown v. Wiggins*, 7 L. T. N. S. 622. See, as to disclosing occupation, *Malpass v. Mudd*, 3 Hurl. & N. 246; 27 Law J. Ex. 367.

⁴ *Shaw v. Neale*, 6 H. L. Cas. 581; 4 Jur. N. S. 695; 27 Law J. Ch. 444.

⁵ *In re Bromhead*, 16 Law. J. Q. B. 355; 5 Dowl. & L. 52; *In re Williams*, 3 De Gex F. & J. 104; 7 Jur. N. S. 323; 30 Law J. Ch. 610; 9 Week. R. 393; 4 L. T. N. S. 103; *Phillips v. Dickson*, 8 Com. B. N. S. 391; 6 Jur. N. S. 401; 29 Law J. C. P. 223; 8 Week. R. 390; 2 L. T. N. S. 185.

⁶ *In re Andrew*, 7 Hurl. & N. 87; 30 Law J. Ex. 403.

⁷ *Pearson v. Sutton*, 5 Taunt. 364; *Duncan v. Richmond*, 7 Taunt. 391; 1 Moore, 99; *De Woolfe v. —*, 2 Chit. 68.

⁸ *Ex parte Holdsworth*, 4 Bing. N. C. 386; 6 Scott, 170. See also *Ex parte Nicholls*, 2 Dowl. N. S. 423; 7 Jur. 374; 12 Law J. 103; *Ex parte Du Faur*, 3 Hodges, 135; *Ex parte Moxon*, 1 D. P. C. 7. See *post*, Chapter VIII.

to deliver them up, the court may compel him to do so.¹ If an attorney be employed by certain *cestuis que trust*, the court will not compel him to deliver up deeds to one of several trustees, one of the trustees objecting to the application;² nor will the court compel the attorney to deliver up on payment of what is due to him deeds which have been intrusted to him for the purpose of raising money upon them.³ But he is bound, upon inquiry by his client, to inform him where such deeds are.⁴

It may be stated, generally, that where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to deliver over papers; but where the employment is so connected with his professional character as to afford a presumption that such character formed the ground of his employment by the client, the court will exercise summary jurisdiction. It will not interfere when he holds them in any other way than as attorney.⁵ So, where an attorney, with whom his own marriage settlement had been deposited for safe custody, was allowed to retain it until after the only child of the marriage, and who was entitled to the property settled, had come of age, the court refused to order him to deliver the settlement up to the trustee.⁶ So, also, the court refused to grant a rule calling upon an attorney to deliver up papers, where it appeared that the documents had come into his possession as executor to his father, who had been attorney to the applicant, but where the applicant did not adopt the son as his professional agent.⁷ So, where the motion was, not only that an attorney should deliver up papers which he held as receiver of an estate, but also that he should give an account, on oath, of his receipts and payments, in respect of a certain mortgaged estate, the court refused to grant an order;

¹ Ex parte Horsfall, 7 Barn. & C. 528; Man. & R. 306; Anderson v. Passman, 7 Car. & P. 193. But see In re Lowe, 8 East, 237; and see Miers v. Evans, 3 Jur. 170.

² In re Gregory, 6 Jur. 282.

³ In re Millard, 1 D. P. C. 140.

⁴ Wilmott v. Elkington, 1 Nev. & M. 749.

⁵ Ex parte Moxon, 1 Dowl. O. S. 6; Goring v. Bishop, 1 Salk. 87; In re Chitty, 2 Dowl. O. S. 421.

⁶ Ex parte Moxon, *supra*.

⁷ Ex parte Nichols, 2 Dowl. N. S. 423; 7 London Jurist, 371.

saying, that this was a matter for a bill in equity, and not for a summary application to a court of law.¹

The court can only interfere to compel an attorney to deliver up deeds in his possession at the instance of the party who deposited them with him.² An attorney is not obliged to obey a *subpœna duces tecum*, and produce papers in order to give evidence of a charge of forgery against his client.³

An attorney, with whom a will has been deposited by the testator, will not be compelled to deliver it up to the sole legatee under it.⁴ The court will not issue an attachment against an attorney for not delivering up papers, pursuant to a rule of court, unless shown that the person making the demand was duly authorized to do so, and stated that fact to the attorney.⁵ The court will not grant a rule requiring an attorney to deliver up papers, and in the alternative for an attachment in case of a non-delivery, but each branch must be made the subject of a separate motion.⁶

§ 94. Summary remedies to compel payment of moneys.—An attorney may be compelled to pay over money collected for his client on a summary application to the court.⁷ The summary remedy for not paying over extends also to an administrator of the client, who may make the application.⁸

An attorney who, by fraud, procures from the court an order by which he obtains money from a party, even not his client, may be proceeded against summarily by attachment; and if he

¹ Cocks v. Harman, 6 East, 404; 2 Smith, 409.

² In re Thornton, 2 D. P. C. 156; In re Bunting, 2 Ad. & E. 467.

³ Rex v. Dixon, 3 Burr. 1687. See *post*, Chapter VIII.

⁴ Ex parte Crisp, 2 D. P. C. 455; Ex parte Smart, 1 Har. & W. 526.

⁵ Hickman v. Hickman, 8 D. P. C. 833; 1 Man. & G. 566.

⁶ Roscoe v. Hardman, 5 D. P. C. 157; 2 Har. & W. 118. When an attorney is a steward or receiver: see Hughes v. Mayre, 3 T. R. 275; Ex parte Grubb, 5 Taunt. 206; Cocks v. Harman, 6 East, 404; 2 Smith, 409. In case of bankruptcy: Ex parte Roy, 4 D. P. C. 573; 1 Har. & W. 669; Nixon v. Moyoh, 1 Moody & R. 76. See generally: Simes v. Gibbs, 6 D. P. C. 310; 1 W. W. & H. 40; Baber v. Harris, 7 D. P. C. 589; Ex parte Morris, W. W. & D. 59; 1 Jur. 151; Watts v. Blaney, 1 D. & L. 203; 7 Jur. 854; Ex parte Maxwell, 4 D. P. C. 87.

⁷ Hess v. Joseph, 7 Robt. 609; Saxton v. Wyckoff, 6 Paige, 182; Merritt v. Lambert, 10 Paige, 352; Hynman v. Washington, 2 McCord, 493; People v. Smith, 3 Caines, 221; In re Dakin, 4 Hill, 44; Ex parte Bayley, 9 Barn. & C. 691; Starr v. Vanderheyden, 9 Johns. 253; In re Lawrence, 2 Smale & G. 367.

⁸ Trasmull v. Shropshire, 22 Tex. 327.

receive the money for his client upon an employment in that capacity, it is immaterial whether any suit or legal proceeding is instituted or not, the attachment may issue to compel payment; nor, in the case of third parties, will the fact that an attorney who has procured money for his client by fraud has paid it over to the client, shield the attorney from liability to the defrauded party.¹

Courts will interfere summarily and compel attorneys to faithfully execute the trusts reposed in them.² Whenever the employment of an attorney is so connected with his professional character as to justify a presumption that his employment was in consequence of that character, they will interfere. In cases of employment to collect, although not retained in any suit or legal proceeding, courts will exercise the like summary jurisdiction.³ In cases of reasonable and probable cause, the court will not give the costs of the application to an attorney, although it afterward transpire that there was no misconduct, and therefore no foundation for the application.⁴

Laches on the part of the client may prevent the court's interference. Where seven years had elapsed after a settlement with the client, the court refused to reopen the accounts in the absence of any suggestion of fraud or misconduct.⁵ But the mere running of the Statute of Limitations has been held not to bar the summary remedy, though the applicant may be compelled to show some reason for not making the application earlier.⁶

In *Langley v. Warner*, 3 N. Y. 327, the money was paid to the attorney upon a perfectly valid judgment, and he accounted to his client for it by applying it, with the client's consent,

¹ *Wilmerdings v. Fowler*, 14 Abb. Pr. N. S. 249; S. C. 45 How. Pr. 142.

² In *re Knight*, 1 Bing. 91; 7 Moore, 437; *Parker v. Marshall*, Lofft, 271; *De Wolfe v. —*, 2 Chitt. 68.

³ In *re Aitkin*, 4 Barn. & Ald. 47; *Ex parte Hall*, 7 Moore, 437; In *re Chitty*, 2 Dowl. O. S. 421; *Ex parte Deane*, 2 Ibid. 533; *Ex parte Cowie*, 3 Ibid. 600; *Ex parte Cohen*, 1 Har. & W. 211.

⁴ *Thwaites v. Roe*, 3 Dowl. & R. 226.

⁵ *Ex parte Sharp*, 5 Dowl. O. S. 717; *Ex parte Yeatman*, 4 Ibid. 304; 1 Har. & W. 510. See *Moulton v. Bennett*, 18 Wend. 586.

⁶ *Ex parte Shipden*, 6 Dowl. & R. 338. See generally: *Tyson v. Ironmonger*, 1 Wils. 30; *Bailey v. Jones*, 1 Chit. 744; *Evans v. P.* 2 Wils. 282; *Gwelliam v. Bar-net*, 2 Smith, 155.

upon a debt against him. The judgment was afterward reversed, but the court held that the attorney was not liable in an action or otherwise for the money, although the client was. There the title to the money vested in the client, and the attorney had discharged his duty and was not in fault.

But where the money never lawfully passed, and the order by which it was obtained had been procured by the fraud of the attorney, he could not make any disposition of it which would shield him from the consequences of the act. This would be so as to any person, and the summary jurisdiction of the court, exercised over its own officers to secure good faith in their dealings with the public, renders the rule peculiarly applicable to an attorney. Where an attorney obtains money from a third party under an order of the court, which would not have been granted had he not suppressed certain material facts, an attachment will issue against him. The suppression of such facts amounts to a fraud upon the court.¹ The court will not order an attorney to pay over a sum of money received by him in his character of attorney, except upon the application of the client to whom the money is due.²

Where an attorney has been employed to prepare mortgage deeds and he receives the money raised by the mortgage, he may be called upon summarily to account for it.³ But the court will not compel an attorney to pay over money, the right to which is dependent on the existence of a special agreement between client and attorney, and which the latter disputes;⁴ nor where the payment has been the result of an agreement; nor to pay over money received as attorney, he having afterward become bankrupt and obtained his certificate,⁵ unless fraud is shown.⁶ The

¹ *Wilmerdings v. Fowler*, 45 How. Pr. 142; S. C. 14 Abb. Pr. N. S. 249.

² *In re Fenton*, 5 Nev. & M. 239; 3 Ad. & E. 404; 1 Har. & W. 310.

³ *Ex parte Cripwell*, 5 D. P. C. 689; W. W. & D. 356; 1 Jur. 755.

⁴ *Hodson v. Terrall*, 2 D. P. C. 264.

⁵ *Ex parte Culliford*, 8 Barn. & C. 220; *Baron v. Martell*, 9 Dowl. & R. 390; *Rex v. Edwards*, 9 Barn. & C. 652; *In re Newberry*, 4 Ad. & E. 100; 5 Nev. & M. 419; 1 Har. & W. 375.

⁶ *In re Bonner*, 1 Nev. & M. 555; 4 Barn. & Adol. 811. It is misconduct in any attorney to charge and receive more fees for any service rendered than the statute allows. If the attorney is to be regarded as receiving his fees officially, his act in receiving illegal ones is one of official misconduct; and because attorneys are regarded as officers of the court, the courts have been in the habit of

court will not summarily compel an attorney to refund to his client costs unnecessarily incurred unless he has been guilty of gross negligence, nor unless the client has first paid them to the attorney.¹

When professional character is the ground of the employment, it is not essential to the exercise of this power that he should have been employed or instructed to commence legal proceedings. It is enough that the money was received by him in his character of attorney; as where a demand is left with him, with instructions to call for payment, or obtain better security, but without any directions to sue.² The employment in a professional capacity is sometimes inferred. Thus, where an attorney received money under a power which described him as a counsellor and attorney, the court said it was manifest that the employers contemplated the party's professional character.³ So, where a bond was left with an attorney, to the end that he should write to the obligor and obtain the money, but without any express direction to bring a suit, in default of payment, the attorney, having received the money without suit, and neglected to pay it over, on demand, to his client, the court held that he received the bond in his character of attorney, and granted a rule against him to show cause why an attachment should not issue for not paying it over.⁴ But where the presumption as to the attorney's acting in a professional character cannot be indulged in, or where it is clear he did not so act, the summary jurisdiction will not be exercised.⁵

granting relief against them by summary motion, treating the act as one of official misconduct in an officer of the court, and therefore to be redressed in a summary manner. (*Merritt v. Lambert*, 10 Paige, 356; *Wallis v. Loubat*, 2 Denio, 607; *Waters v. Whittemore*, 22 Barb. 593.)

¹ *Meggs v. Binns*, 2 Bing. N. C. 625; 3 Scott, 52; 2 Hodges, 10; *Dickenson v. Jacobs*, 10 Week. R. 303; 5 L. T. N. S. 757; *Layton v. Wood*, 3 Jur. 124; *Ex parte Wood*, 12 Week. R. 136; 9 L. T. N. S. 420. See generally: *In re Ford*, 8 D. P. C. 684; *In re Morris*, 2 Ad. & E. 582; *In re Cardross*, 7 D. P. C. 861; 5 Mees. & W. 545; *Ex parte Faith*, 9 D. P. C. 973; 5 Jur. 653; *Nash v. Goode*, 9 D. P. C. 929; *Anon.*, 11 Jur. 396; *Tharratt v. Trevor*, 7 Ex. 161; 21 Law J. Ex. 59.

² *In re Dakin*, 4 Hill, 44.

³ *De Woolfe v. —*, 2 Chit. 68; *In re Dakin, supra*; *Ex parte Creswell*, 5 Dowl. O. S. 689; *In re Cretwell v. Fosbrooke*, 1 London Jurist, 755.

⁴ *Ex parte Staats*, 4 Cowen, 76.

⁵ *Ex parte Schwalbanker*, 1 Dowl. O. S. 182; *Ex parte Faith*, 9 Dowl. O. S. 973; 5 London Jurist, 751; *In re Dakin*, 4 Hill, 42; *Ex parte Deane*, 2 Dowl. O. S. 533.

For neglecting or refusing to pay over money collected for the client, a rule will be granted to show cause why an attachment should not issue.¹ But he cannot be proceeded against in this way, nor by action to recover the money, until after demand or order to remit, although the attorney may have expressed his intention to keep the money, upon a claim of indemnity on the part of his client growing out of some other matter, unless such intention or declaration came to the knowledge of the client or his agent before action brought or proceedings commenced.² If the client choose to commence an action against the attorney, he must first discontinue it, before he can invoke the summary jurisdiction of the court.³ Neither can the summary jurisdiction be invoked, if the client takes a note for the amount, thus merging the relation of attorney and client into that of debtor and creditor.⁴

A charge that the attorney had in his hands money belonging to the party making the motion and another person, collected by him as their attorney, in a certain case tried in the same court, at a term specified, mentioning the amount so collected for each and thus withheld, which said attorney refused to pay them on demand, or in any manner account for, is a sufficient specification of facts.⁵ On a charge against an attorney for refusing to pay over money collected by him, it appeared that the money had long before been paid to the party entitled, who made no complaint, and there was a dispute as to the attorney's fee. It was held that if the party to whom the money belonged made no complaint it was no concern of the relative, who was a stranger. Besides, seven years had elapsed since the alleged misconduct. The delay was fatal. The law does not favor informations against attorneys at law, after the lapse of a great length of time. The party whose rights are injuriously affected

¹ *People v. Wilson*, 5 Johns. 368; *In re Dakin*, 4 Hill, 42; *Calliford v. Warren*, 8 Barn. & C. 220; *Rex v. Edwards*, 9 Ibid. 652; *Matter of Bonner*, 1 Nev. & M. 555; 4 Barn. & Adol. 811.

² *Ex parte Ferguson*, 6 Cowen. 596; *Taylor v. Bates*, 5 Cowen, 376; *Lillie v. Hoyt*, 5 Hill, 395; *Rathbun v. Ingalls*, 7 Wend. 320.

³ *Anon.* 5 London Jurist, 678. But see *Ex parte A. B.* 4 Ibid. 630.

⁴ *Bohanan v. Peterson*, 9 Wend. 503.

⁵ *Reilly v. Cavanaugh*, 32 Ind. 214.

by conduct of the character alleged, ought to be required to exhibit his information within a reasonable time, that the attorney implicated may be afforded an opportunity to make his defense while testimony for that purpose can be had.¹ The court will not interfere summarily when there is a *bona fide* dispute which is a question for a jury; as, where the right is dependent on the evidence of a special agreement between the client and the attorney, which is disputed.²

§ 95. Imposing costs.—The courts have summarily inflicted costs on attorneys in cases of positive fraud and malpractice, and sometimes in cases of gross carelessness or negligence. Costs have been imposed on attorneys for pleading a sham plea, though instructed by the client to do so;³ drawing papers with unnecessary prolixity;⁴ proceeding on behalf of fictitious parties or persons who have absconded;⁵ inserting immaterial, irrelevant, or scandalous matter in the pleadings;⁶ making obviously unnecessary applications to the court, or in any way causing expense clearly unnecessary.⁷

Imposing costs in conducting suits in equity.—In equity, as well as in law, solicitors, guilty of gross neglect, fraud, or other mis-

¹ *People v. Allison*, 68 Ill. 151. Where an attorney obtained a sum of money from a person, on his representation that the latter had title to a certain tract of land, which, the attorney stated, was in a high state of cultivation, had valuable improvements upon it, and was worth \$15,000; and representing that the money was required to refund taxes which had been paid by the party in adverse possession, before suit could be commenced, and afterward tried to get more, representing that he had commenced suit for the land, and that a larger amount of taxes had been paid than he supposed—all the representations being false—his name was stricken from the roll. (*People v. Ford*, 54 Ill. 520. See *In re Brown*, 2 Col. T. 553.) An indictment against an attorney, for collecting and receiving, in the capacity of attorney at law, money belonging to the prosecutor, and neglecting to pay the same to him after demanded, etc., but not distinctly averring that the relation of attorney and client existed between the defendant and prosecutor, is insufficient. (*People v. Tryon*, 4 Mich. 665.)

² *Hodson v. Terrall*, 2 Dowl. O. S. 264; *Beal v. Langstaff*, 2 Wils. 371.

³ *Blewit v. Marsden*, 10 East, 237; *Vincent v. Grodiece*, 1 Chit. 182.

⁴ *Ex parte Smith*, 1 Atk. 139.

⁵ *Hoskins v. Phillips*, 16 Law J. Q. B. 339; *American Insurance Co. v. Oakley*, 9 Paige, 496; *Glyn v. Kirby*, 1 Str. 402; *Hall v. Bennett*, 2 Sim. & St. 78; *Wright v. Castle*, 3 Mer. 12.

⁶ *Ex parte Simpson*, 15 Ves. Jr. 476; *Powell v. Kane*, 5 Paige, 265; *Sommers v. Torrey*, *Ibid.* 54; *Cushman v. Brown*, 6 Paige, 539.

⁷ *Rolfe v. Rogers*, 4 Taunt. 191; *Blundell v. Blundell*, 1 Dowl. & R. 142; 5 Barn. & Ald. 533; *Clarke v. Gorman*, 3 Taunt. 492; *Adlington v. Appleton*, 2 Camp. 410.

conduct, will be ordered to pay costs.¹ An order may also be made upon the attorney to show cause why he should not be stricken from the roll if the offense is of sufficient gravity. Where an affidavit contained scandalous and irrelevant matter, Lord Eldon ordered the solicitor who made the affidavit to pay the costs of the application, and all other costs; and, after payment, the affidavit to be removed from the files.² Where affidavits were sworn to before a solicitor in the cause, the court compelled him to pay the costs, and dismissed the petition of which they were the basis.³ And where a solicitor filed a bill after the plaintiff had absconded, and without any instructions from him, but with the instructions of the plaintiff's brother-in-law, and the suit was dismissed for want of prosecution, the solicitor was ordered by the court to pay the costs.⁴

§ 96. Answering matters of affidavits.—The court will not grant a rule calling upon an attorney to answer the matters of an affidavit, nor compel an answer where, if the facts suggested exist, they might be the foundation of an indictment.⁵

When an attorney does not appear to show cause against a rule calling on him to answer the matters of an affidavit, the court will make the rule absolute to answer within a certain time, and, in default, that an attachment issue against him, and also that he be struck off the roll.⁶ In the case of indictable offenses, the court will not grant a rule calling on an attorney to answer the matters of an affidavit, but will grant a rule *nisi*, calling on him to show cause why he should not be struck off the roll of the court.⁷

¹ *Floyd v. Nangle*, 3 Atk. 368; *Fawkes v. Pratt*, 1 P. Wms. 593; *Ex parte Conway*, 13 Ves. 62; *Ex parte Heywood*, Ibid. 67; *Ex parte Cuthbert*, 1 Madd. 78; *Ex parte Houghton*, 1 Glyn & J. 14; *Dungey v. Angove*, 2 Ves. Jr. 304.

² *Turn & Ven. Pr. Ch. 2*; 15 Ves. 476; 18 Ibid. 114; 3 Ves. & B. 93.

³ *In re Logan*, 3 Atk. 813.

⁴ *Hall v. Bennett*, 2 Sim. & St. 78.

⁵ *Robertson v. Mills*, 1 Dowl. N. S. 772; 6 Jur. 896. See also *Belcher v. Godered*, 4 Com. B. 472; *Haigh v. Jones*, 1 Dowl. & L. 81; 6 Scott N. R. 696; 5 M. & G. 634; *In re Eyre*, 1 Com. B. N. S. 151; *Meux v. Lloyd*, 2 Ibid. 409; *In re Holmes*, 12 Jur. 657.

⁶ *In re Worman*, 1 Hurl. & C. 636; 32 Law J. Ex. 83; 11 Week. R. 26; 7 L. T. N. S. 249.

⁷ *Anon.* 12 Week. R. 311. See *Anon.* 12 Week. R. 1012. It has been held in England that the court would not interfere in a summary when the miscon-

§ 97. Attachments against attorneys—Contempts.—If an attorney misconduct himself in his profession, he is, in many cases, liable to an attachment. Attachments against them are also moved for in cases of unfair dealings toward their clients, as for delaying suits, putting the parties to unnecessary expense, demanding fees for business not performed, refusing to surrender papers, or money recovered and received for clients. A rule to show cause or deliver up is generally first made.¹ But the money or writings must be received in the capacity of attorney, otherwise the party will be left to his ordinary remedy by action.²

Attachments are granted in all cases of contempts, as if an attorney disobey an order of court, after being personally served with such order. It has been held a contempt of court to assign the death of a plaintiff in ejectment for error;³ or to bring a fictitious action;⁴ or to serve process on one pursuing his business in court;⁵ or to refuse answering questions by the court;⁶ or to undertake to appear, and then not appear;⁷ or to let an argument go on to get an opinion of the court, after the parties have privately agreed.⁸ In cases of contempt, the specific offense charged

duct complained of amounted to an indictable offense, on the ground that the attorney should not be called upon to answer criminatory matter, as his answer might be afterward evidence against him in case of indictment. (*Matter of —*, 5 Barn. & Adol. 1088; *In re Knight v. Hall*, 1 Bing. 142; *Short v. Pratt*, 1 Bing. 102; 7 Moore, 424; *Anon.* 2 Dowl. O. S. 110; 2 *London Jurist*, 467; 12 *Law J. Q. B.* 331; *In re —*, 3 Nev. & P. 389; *Ex parte Jones*, 2 Dowl. O. S. 161; *Robertson v. Mills*, 6 *London Jurist*, 896; 1 Dowl. N. S. 772.)

But the rule has been restricted to cases where the attorney, according to the English practice, is called upon to answer matters of affidavit; and in cases of professional misconduct in the course of an action, the courts have called upon the attorney to show cause why his name should not be stricken from the roll, even though the matters complained of amounted to an indictable offense, and yet would not compel him to answer the affidavit charging the offense. (*Stevens v. Hill*, 10 Mees. & W. 28; 1 Dowl. N. S. 669; 6 *London Jurist*, 585.)

But in cases of misconduct or malpractice not amounting to an indictable offense, courts have compelled the attorney to answer the affidavit charging the same. (*Evans v. —*, 2 Wils. 382; 3 Dowl. & R. 602.)

¹ *Hawk. P. C.* chap. 22, sec. 10; *Coye's Case*, Style, 129; *Fernald v. Ladd*, 4 N. H. 370; *Gruggen v. White*, 4 Taunt. 881.

² *Ibid.*

³ *Strange*, 890.

⁴ *Cox v. Phillips*, Cas. t. Hardw. 237; 8 Mod. 109.

⁵ *Andrew*, 275; *Strange*, 1094.

⁶ *Strange*, 1197; Wils. 30.

⁷ Cas. t. Hardw. 131; Com. Dig. Attorney, B. 13, 15.

⁸ *Strange*, 420.

should be distinctly stated, and an opportunity given of answering.¹

Language may be contemptuous, whether written or spoken ; and if in the presence of the court, notice is not essential before punishment ; and scandalous and insulting matter in a petition for rehearing is equivalent to the commission in open court of an act constituting a contempt. Where the language is capable of explanation, and is explained, the proceedings must be discontinued ; but where it is offensive and insulting *per se*, the disavowal of an intention to commit a contempt may tend to excuse, but cannot justify, the act. For an open, notorious, and public insult to a court, for which an attorney contumaciously refused in any way to atone, he was fined for contempt, and his authority to practice revoked.²

The publication by an attorney of an article in a newspaper criticizing the rulings of the court in a cause tried and determined prior to the publication, does not constitute contemptuous or violent behavior, punishable by contempt. If made during the trial, it would present a different question.³

It has also been held a contempt of court to alter the name in a sheriff's warrant,⁴ or to sign a counsel's name to a bill in equity without his consent,⁵ and to refuse to prove the execution of a deed to which the attorney is a subscribing witness,⁶ to swear to an incredible story in an affidavit.⁷

But in those cases where there has been mere negligence on the part of the attorney, or where the damages which the injured party has sustained are proper for a jury to pass upon, or where no fraud has been practiced, the court will not generally interfere on motion, but will leave the parties to their remedy by action.⁸ An attachment was therefore refused against an at-

¹ In re Pollard, 2 Law R. P. C. 106.

² In re Woolley, 11 Bush, 95; Ex parte Secombe, 19 How. 13; In re Charlton, 2 Mylne & C. 317; People v. Freer, 1 Caines, 484; Watson v. Bank, 5 Rich. 159; Hirst v. Ingersoll, 9 Phila. 216.

³ State v. Anderson, 40 Iowa, 207.

⁴ 1 W. Black. 2.

⁵ Fawcett v. Garford, Trin. 29 Geo. III.

⁶ Cowp. 845.

⁷ In re Crossley, 6 Durn. & E. 701; In re Elsam, 3 Barn. & C. 597; 5 Dowl. & R. 389.

⁸ Ex parte Brooks, 1 Bing. 105; In re Jones, 1 Chit. 651; Barker v. Butler, 2 W. Black. 780; Anon. Lofft, 545.

torney appearing without warrant, because the defendant, if injured by such appearance, might have his remedy by action;¹ so for an attorney acting without being duly sworn, because he was liable to a penalty.²

Contempt of the jurisdiction of the court, default in obeying a rule of court, or in answering an affidavit imputing misconduct, subject an attorney to fine and attachment, as improperly altering pleadings, inserting scandalous matter in them, exercising extortion, fraud, or malpractice, bringing a fictitious action,³ suffering an unqualified person to use the attorney's name in legal proceedings, yet in such a way as not to subject him to suspension from practice;⁴ and in a case where an attorney, without any unworthy motive, prepared a special case to get the opinion of the court upon a will, and made suggestions which had no foundation in fact, the court considered him guilty of contempt.⁵

Where an attorney was retained to defend an action, and allowed judgment to go by default, and afterward desired his client not to attend to endeavor to mitigate the damages, because the proceedings might be set aside for irregularity, when in fact they could not, and finally execution was sued out, and the client paid the sum claimed and costs—it was held that the client's only remedy against the attorney was by action,⁶ and a court has refused to proceed summarily against an attorney on an affidavit containing a charge of conspiracy, or other indictable offense, but will leave the party to proceed by indictment.⁷

A court has refused to grant an attachment against an attorney for bringing, contrary to agreement, a writ of error, where it was shown that it was not done for delay, and the attorney was led into a mistake.⁸

An attachment will not be granted against an attorney for an

¹ *Anon.* Comb. 2; 6 Mod. 16; 5 Mod. 205.

² *Hounslow v. Roberts*, 1 Barnes, 18.

³ Lord Hard. Cases, 237; *Williams v. Douglas*, 5 Beav. 83; *Farrell's Case*, Andrew, 278.

⁴ *Ex parte Whatton*, 5 Barn. & Ald. 824; *Starr v. Vanderheyden*, 9 Johns. Ch. 253; *Phelps v. Overton*, 4 Hayw. (Tenn.) 292; *Rose v. Mynatt*, 7 Verg. 30; 18 Wend. 586; 3 Paige, 510; 5 Paige, 62.

⁵ *In re Elsam*, 3 Barn. & C. 597.

⁶ *In re Jones*, 1 Chit. 651, 186.

⁷ *Short v. Pratt*, 1 Bing. 102; *Knight v. Hall*, 1 Bing. 142.

⁸ *Camden v. Edee*, 1 H. Black. 21.

error of judgment, nor for compromising an action without the consent of the principal, nor for neglecting to enter an appearance for a defendant in pursuance of his undertaking, nor where the undertaking had been written by the attorney, but never signed, nor generally in cases where statutory penalties are provided for the client in the event of the attorney's misconduct, but the parties will be left to sue for the penalty.¹

Liability to attachment.—An attorney not entering an appearance in pursuance of his undertaking is liable to an attachment.² And where money has been wrongfully detained by an attorney from his client, and a rule requiring him to pay that money over has been made absolute against him, the court will grant a rule for an attachment absolute in the first instance, he not having complied with the rule.³ An attachment may be issued to compel an attorney to deliver up papers to a client.⁴

Where an attorney is in contempt for disobeying a rule, the proper practice is to move for an attachment, and not to apply to have him stricken from the rolls.⁵ Demand to deliver papers should be made before applying for the attachment, and the person making the demand must be authorized to do so, and state that fact to the attorney.⁶ Personal service of the attachment should be made.⁷

The attachment.—In England, the attachment is regarded as being in the nature of a criminal process, directed to the sheriff, commanding him to attach the party, so that he may have him before the king, or his justices at Westminster, on a certain day, to “answer of and concerning those things which shall there on his majesty's behalf be objected against him.” The party being

¹ *Harrington v. Jennings*, Lofft, 188; *Anon.* Lofft, 433, 192; *Mould v. Roberts*, 4 Dowl. & R. 719; *Camden v. Edie*, *supra*; *Hounslow v. Roberts*, 1 Barnes, 18; *Matthews v. Royle*, 6 Moore, 70; *Ex parte Flint*, 2 Dowl. & R. 406.

² Reg. Gen. Q. B. C. P. Ex. H. T. 16 Vict. 2, 3; 1 El. & B. App. 3; *Jacob v. Magnay*, 12 Law J. Q. B. 93; 7 Jur. 326.

³ *Ex parte Burgin*, 1 Dowl. N. S. 292; *Ex parte Brightmore*, 6 Jur. 15.

⁴ *Ex parte Willand*, 11 Com. B. 544. See, where attachment has been refused, *Reg v. Carttar*, 1 Lown. M. & P. 386; 19 Law J. Q. B. 422; *Poole v. Watkins*, 4 D. P. C. 11; *Ex parte Lawrence*, 2 Ibid. 230.

⁵ *Ex parte Townley*, 3 D. P. C. 39; *Ex parte Grant*, 3 Ibid. 320.

⁶ *Hickman v. Hickman*, 8 D. P. C. 833.

⁷ *Anon.* 1 Dowl. & R. 529; *Short v. Smith*, 1 Man. & G. 211; 8 D. P. C. 584; 1 Scott N. R. 153; *In re Holiday*, 9 D. P. C. 1020; 5 Jur. 532. See, generally, *Stevenson v. Power*, 9 Price, 384; *Anon.* 10 Jur. 198.

taken on this writ either remains in custody, or puts in bail before the court or judge, for it has been doubted whether he is bailable by the sheriff, to answer interrogatories, and to appear from day to day till the court shall determine concerning the matters objected against him.

A rule for an attachment is the ordinary remedy in case of non-payment of money, directed by the court to be paid over, and for not delivering up papers;¹ but generally it cannot be resorted to for mere error of judgment on an attorney's part, or for his acting contrary to the client's instructions, or for being guilty of negligence, as these matters are properly the subjects of action.² If a contempt be committed by a person present in court, and it appear, either from the confession of the party in his examination upon oath, or by the view or immediate observation of the judges themselves, the court may immediately record the crime and commit the offender, and also inflict such further punishment as it deems proper.³

Practice.—To invoke the summary remedy of attachment, the act complained of must be the personal act of the attorney, or violation of his personal duty.⁴ For disobedience to an order, the motion for attachment should be made in the court in which the previous proceeding took place, and be supported by proof of service of the previous order, and a demand and refusal to perform the act required. Personal service is usually necessary.⁵ Every preliminary should have been complied with to make the right of the applicant complete.⁶ Although usually where an attachment is moved for non-performance of an order

¹ *Stevenson v. Power*, 9 Price, 384; *Saxton v. Stowell*, 11 Paige, 526; *Anon.* 22 Wend. 656; *Gruggen v. White*, 4 Taunt. 881; *Stone v. Stone*, *Ibid.* 601.

² *Harrington v. Jennings*, Lofft, 188; *Anon. Ibid.* 433, 545; *Parker v. Butler*, 2 W. Black. 780; *Evans v. Watrous*, 2 Port. 205; *Wilson v. Russ.* 7 Shep. 421; 21 Ala. 647; 10 Serg. & R. 368.

³ 2 Hawk. P. C. chap. 22, sec. 1.

⁴ *Poole v. Watkins*, 4 Dowl. 11; *Ex parte Townley*, 3 Dowl. 39; *Ex parte Grant*, 3 Dowl. 320; *Short v. Smith*, 1 Man. & G. 211.

⁵ *Poole v. Watkins*, *supra*; — *v. Barton*, 2 Chit. 66.

⁶ See, as to practice in attachment in summary proceedings, *Mangin v. Cheeney*, 1 Hill, 145; *Thomas v. Cummins*, 1 Yates, 1; *Respub. v. Oswald*, 1 Dall. 328; *Watts v. Robertson*, 4 Hem. & M. 442; *Hollingsworth v. Duane*, Wall. 141; *People v. Tefft*, 3 Cowen, 340; *Morris v. Marcy*, 4 Ham. 83; *Matter of Ferguson*, 6 Cowen, 569; *Ex parte Staats*, 4 Cowen, 76; *Ex parte Ketchum*, 4 Hill, 564; *People v. Nevins*, 1 Hill, 154; *Howland v. Ralph*, 3 Johns. 20.

of the court, in all cases, except for non-payment of costs, it is pursuant to a rule to show cause; still, where the attorney has had full opportunity to show cause in previous proceedings, the rule for the attachment may be absolute in the first instance.¹ And so, when the order disobeyed contained a clause authorizing the issue of an attachment in case of disobedience;² but the courts do not generally grant the first rule in the alternative;³ as, that the attorney do the act required, or, in default, why an attachment should not issue. The affidavit on which the motion for an attachment is made should depose to personal service of the previous rule or order.⁴

When one is arrested on an attachment for not obeying a judge's order, he cannot purge his contempt or be discharged, unless his compliance with the order be complete and *bona fide*. So, where an attorney was so arrested, for not obeying an order directing him to deliver his bill of costs, and also an account of all moneys received by him on account of his client, and he prayed to be discharged out of custody on the delivery of a bill and cash account, verified only by his clerk, who swore that the account gave credit for all sums received, as he was informed and believed, (no affidavit verifying the account being made by the defendant himself) the court refused to discharge the defendant immediately out of custody; but directed his bill of costs and account to be referred, with directions to report on what terms the defendant should be discharged.⁵ The defendant, it was said, should himself have sworn to the accuracy of the accounts, that they were full and accurate, and that he had given credit for all moneys received.

§ 98. Contempts in the United States Courts.—The seventeenth section of the United States Judiciary Act of 1789 provides⁶ that all the courts of the United States “shall have

¹ *Chaunt. v. Smart*, 1 Bos. & P. 477; *King v. Price*, 1 Price, 341; *Stevenson v. Power*, 9 Price, 384; *Ex parte Burgin*, 1 Dowl. N. S. 292; *Ex parte Brightmore*, 6 London Jurist, 15.

² *Ex parte Grant*, 3 Dowl. P. C. 320.

³ *Roscoe v. Hardman*, 5 Dowl. 157.

⁴ *Anon.* 2 Chit. 66.

⁵ *Reg. v. Weston*, 8 Jur. 1122.

⁶ 1 Stats. at L. 83.

power * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

An Act of March 2nd, 1831, entitled "An Act declaratory of the law concerning contempts of court," provides in its first section "that the power of the several courts of the United States to issue attachments and inflict summary punishment for contempts of court, shall not be construed to extend to any cases, except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts, in their official transactions, and the disobedience or resistance, by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

In *Ex parte Robinson*,¹ in the Supreme Court of the United States, Justice Field, in delivering the opinion of the court, said: "The power to punish for contempts is inherent in all courts: its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the Act of Congress of March 2nd, 1831. The act, in terms, applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the circuit and district courts, there can be no question. These courts were created by acts of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The Act of 1831 is therefore, to them, the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases. 1st. Where there has been misbehavior of a person

¹ 19 Wall. 505.

in the presence of the courts, or so near thereto as to obstruct the administration of justice. 2nd. Where there has been misbehavior of any officer of the courts in his official transactions. 3rd. Where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts, in the punishments of contempts, can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.”

The Act of 1789, only authorizing a contempt to be punished by fine or imprisonment, an attempt on the part of a district or circuit judge of the United States to punish a contempt by disbarring or suspension, is unauthorized and void. The enactment is a limitation upon the manner in which the power shall be exercised, and is a negation of all other modes of punishment; and a judgment disbarring an attorney, treated as a punishment for a contempt, is unauthorized and void.¹

§ 99. Miscellaneous offenses.—Attorneys have been adjudged guilty of contempt for preparing a special case having no foundation in fact, for the purpose of getting the opinion of the court on such a state of facts, and this where there was no corrupt or otherwise unworthy motive.² It is a high misdemeanor for an attorney to compromise a criminal charge, and may subject the attorney to fine or suspension, or both, as where the attorney was instrumental in letting one charged with forgery out of the custody of the officers of the law;³ the same punishment will be inflicted in cases of palpable fraud.⁴

Where an attorney has been *suspended* for a term of years by one court, it is not compulsory on other courts of co-ordinate jurisdiction, as in the case of striking from the rolls, to suspend him; but they will look into the affidavits and exercise their own

¹ *Ex parte Robinson*, 19 Wall. 505.

² *In re Elsam*, 5 Dowl. & R. 389; 3 Barn. & C. 597.

³ *Rex v. Vaughan*, 1 Wils. 221.

⁴ *In re Blake*, 3 El. & E. 34; 6 Jur. N. S. 1242; 2 L. T. N. S. 429; 30 Law J. Q. B. 32.

discretion.¹ Where serious charges of misconduct are brought before the court of which he is a member, the court will not permit any private arrangement of it to be made between the parties, but will require that such misconduct be fully explained to the satisfaction of the court.²

§ 100. Summary jurisdiction under statutes in England.—By the 23 and 24 Vict., chap. 127, sec. 24, (Act of 1860) it was enacted that where the name of an attorney or solicitor should be ordered to be struck off the roll of attorneys or solicitors of any court, on his own application, or on the application of any other person, the rule or order for that purpose should forthwith, and before being acted upon, be produced to the registrar of attorneys and solicitors, who was required to enter a note or minute of the rule or order in connection with the name of such attorney or solicitor on the roll of attorneys and solicitors kept by the registrar, and to strike the name off the roll, and to mark the rule or order as having been entered.

By a later statute, 37 and 38 Vict., chap. 81, it was enacted that where application is intended to be made to any court for an order or rule to strike the name of any attorney or solicitor (not being the attorney or solicitor making the application) off the roll, or for an order or rule to compel him to answer the matters of an affidavit, notice in writing must be given to the registrar of such intended application fourteen clear days at the least before such application is made. Copies of all affidavits intended to be used in support of such application shall be delivered to the registrar with the notice.

The court shall not entertain any such application except upon production of an affidavit proving that the notice required by this act has been duly given, and that copies of all such affidavits have been duly delivered to the registrar. The registrar may appear by counsel upon the hearing of any such application, and upon any other proceedings arising out of or in reference to the application, and may apply to the court to make absolute any rule *nisi* which may have been granted by the

¹ In re De Medina, 10 Week. R. 627; 6 L. T. N. S. 536.

² Anon. 9 L. T. N. S. 299.

court in the matter of such application; or to make an order that the name of the attorney or solicitor be struck off the rolls, or, as the case may be, to order him to answer the matters of the affidavit, or such other order as to the court may seem fit; and the court may order the costs, charges, and expenses of the registrar, of or relating to any of the said matters, to be paid by the attorney or solicitor against whom the application is made or was intended to be made, or by the person by or on whose behalf the application is made or was intended to be made, or partly by one and partly by the other of them.¹

The name of every person struck off the roll of attorneys of the superior courts shall, upon production of an office copy of the rule or order, and an affidavit of the identity of the person named, to the proper officer of any other court of which such person is an attorney or solicitor, be struck off the roll of such other court, and the same provisions are made, *mutatis mutandis*, in case of restoration to the roll.²

Every person who acts as an attorney or solicitor contrary to the enactments of the statutes, or who, in his own name, or in the name of any other person, acts without being qualified, is guilty of a contempt of court, and may be punished accordingly, and shall be incapable of maintaining any action or suit for any fee or reward for or in respect of anything done, or any disbursement made, by him in the course of so acting, and shall, in addition to any other penalty or forfeiture, and to any disability to which he may be subject, forfeit and pay for every such offense the sum of fifty pounds, to be recovered with full costs of suit, by action brought with the sanction of the attorney-general, in the name of the incorporated law society, in any of the superior courts of law at Westminster, or in any county court.³

§ 101. Removal and suspension in Alabama.—Reference will now be made to a few of the statutory provisions in the United States, and merely by way of illustration. An attorney must be removed for the following causes by the courts of Ala-

¹ 37 and 38 Vict. chap. 68, secs. 8, 9, 10.

² 23 and 24 Vict. chap. 127, secs. 34, 35.

³ *Ibid.* sec. 36.

bama: Upon his being convicted of a felony other than manslaughter, or misdemeanor involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence. When any judgment is rendered against him for money collected by him as an attorney, upon which judgment an execution has issued, and been returned no property; in which case the record of the judgment and execution is conclusive evidence. The attorney may be removed or suspended upon its being shown to the satisfaction of the court that he has been guilty of any deceit or willful misconduct in his profession; for a willful disobedience or violation of the order of a court requiring him to do or forbear an act connected with or in the course of his profession.

The proceedings to remove or suspend an attorney may be taken by the court of its own motion, or upon the motion of any third party. The accusation must be in writing, and when the proceeding is taken by the court it may be drawn up by the solicitor or the clerk, under the direction of the court. If the proceedings are upon the information of another, the accusation must be verified by the oath of the person making it, or some other person, and presented to the court. The court must then, if of opinion that the accusation would, if true, be grounds of removal or suspension, make an order requiring the accused to appear and answer the same at a specified day, and must cause a copy of the order and accusation to be served on the accused, within a prescribed time, before the day appointed in the order. The accused must appear at the time appointed, and answer the accusation, unless for sufficient cause the court assign another day; and if he do not appear, the court may proceed and determine the accusation in his absence. The accused may answer, either by objecting to the sufficiency of the accusation or by denying its truth, either of which must be entered on the minutes. If the objection to the sufficiency of the accusation be not sustained, the accused must answer it forthwith. If he plead guilty or refuse to answer the accusation, the court must proceed to judgment of removal or suspension. If he deny the accusation, the court must immediately, or at such time as it may appoint, proceed to try the same, the accused having a right to demand a trial by jury. A judgment of acquittal is final; but from a

judgment of removal or suspension the accused may appeal to the supreme court at any time within thirty days after judgment.

The proceedings, when instituted by the court of its own motion, are conducted in the name of the State, the solicitor appearing to sustain the accusation, and when on the information of another in the name of the State, on the information of such person. Either party has a right to subpoenas and other process to compel the attendance of witnesses; and testimony may be taken by deposition as in actions at law; and the court may, in its discretion, require the informant to give security for costs, and failing so to do within the time prescribed, the proceedings must be dismissed at the costs of the informant.

Upon the death of the informant, if there be but one, the proceedings abate, unless some other person is substituted in his place, which may be done on application to the court. If there is more than one informant, the proceedings continue on the information of the survivors.¹

§ 102. In Arkansas.—Any attorney guilty of any felony or infamous crime, or improperly retaining his client's money, or of any malpractice, deceit, or misdemeanor in his professional capacity, or shall be an habitual drunkard, or shall be guilty of any ungentlemanly conduct in the practice of his profession, may be removed or suspended from practice upon charges exhibited against him, and proceedings thereon had. The charges must be exhibited in the county in which the offense is committed, or in which the accused resides. The court fixes a time of hearing, allowing a reasonable time to notify the accused; citations are served upon him, and a copy of the charges. If he refuse or fail to appear, his appearance may be compelled by attachment, or the court may proceed *ex parte*. If the charges allege a conviction for an indictable offense, the court, on the production of the record of conviction, removes the person so convicted, or suspends him from practice for a limited time, according to the nature of the offense, and without further trial. Upon other charges, the court has power only to suspend the accused from practice until the facts shall be ascertained. If

¹ Rev. Code Alabama, secs. 881-895.

the charges be for an indictable offense, and no indictment be found, or, being found, shall not be prosecuted to trial within six months, the suspension shall be discontinued, unless the delay be produced by the absence or the procurement of the accused, when the suspension may continue until the final decision.¹

If any attorney, receiving money for his client, shall refuse or fail to pay the same over on demand, such attorney may be proceeded against in a summary way, on motion before the circuit court, either in which he may reside, or in the county in which he received the money, and the court shall render judgment against him for the amount of money received by such attorney for the use of his client, with costs, and he shall be further dealt with as the court may deem just under the provisions of this act.² An attorney cannot be held liable for money collected by him as such, unless a demand be made, and he refuses to pay over or remit, according to his client's instructions. His liability depends upon the principle of agency, and he holds money, when collected, as bailee.³

The record of conviction or acquittal of any indictable offense shall, in all cases, be conclusive evidence of the facts, and the court shall proceed thereon accordingly. When the matter charged is not indictable, the trial of the facts alleged shall be had in the court in which the charges are pending; which trial shall be by jury, or, if the accused fails to appear, or, appearing, does not require a jury, then by the court. In all cases of conviction, the court must pronounce judgment of removal or suspension, according to the facts found. All charges must be verified by affidavit, and prosecuted by the prosecuting attorney of the circuit in which the charges are pending. On trial, the accused may except to any decision of the court, and may prosecute an appeal to the Supreme Court, or writ of error, in all respects as in actions at law. Every judgment of removal or suspension so made operates, while it continues in force, as a removal or suspension from practice in all the courts of the State; convictions in other States have the same effect as

¹ Ark. Digest, 1874, secs. 493-501.

² Ibid. sec. 492, sec. 3644, *et seq.*

³ Cases cited *supra*; Taylor v. Spears, 6 Ark. 381.

though had in the State upon a production of a copy of the record.¹

§ 103. California.—The causes of suspension and removal of attorneys and counsellors in California, and the practice therein, are much the same as those of which an abstract has already been given above in the Alabama statute. The latter statute was virtually followed in the California code. In California, there are the additional causes of suspension or removal of “violation of the oath taken by him, or of his duties as such attorney and counsellor,” and “corruptly and without authority appearing as attorney for a party to an action or proceeding,” and “lending his name to be used as attorney and counsellor, by another person who is not an attorney and counsellor.”

In all cases where an attorney is removed or suspended by a district court, the judgment or order of removal or suspension may be reviewed on appeal by the Supreme Court.²

§ 104. New York.—An attorney or counsellor who is guilty of any deceit, malpractice, crime, or misdemeanor, may be suspended from practice or removed from office, by the supreme court, at a general term thereof. A copy of the charges against him must be delivered to him, and he must be allowed an opportunity of being heard in his defense. The suspension or removal by the supreme court operates as a suspension or removal in every court in the State. An attorney or counsellor who is guilty of any deceit or collusion, or consents to any with intent to deceive the court or a party, forfeits to the party injured by his deceit or collusion treble damages. He is also guilty of a misdemeanor. If he willfully delays his client's cause with a view to his own gain, or willfully receives money or an allowance for or on account of money, which he has not laid out or become answerable for, he forfeits to the party injured treble damages. If he knowingly permits a person, not being his general law partner, or a clerk in his office, to sue out a mandate or

¹ Ark. Dig. 1874, secs. 502-509.

² Code Civil Procedure Cal. See sec. 287; secs. 288-299; 1 Cal. 143; 1 Cal. 190; 20 Cal. 427.

to prosecute or defend an action in his name, he, and the person who so uses his name, each forfeits to the party against whom the mandate has been sued out, or the action prosecuted or defended, the sum of fifty dollars, to be recovered in an action.¹

An attorney or counsellor shall not, directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon. He shall not by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind for the purpose of bringing an action thereon. A violation of these provisions is a misdemeanor, punishable accordingly, and by removal from office by the supreme court.

But they do not prohibit the receipt of a bond, promissory note, bill of exchange, book debt, or other thing in action in payment for property sold, or for services actually rendered, or for a debt antecedently contracted, or from buying or receiving a bill of exchange, draft, or other thing in action, for the purpose of remittance, and without intent to violate these provisions.

A court of record has power to punish by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding pending in the court, may be defeated, impaired, impeded, or prejudiced, among other cases, in the case of an attorney or counsellor for a misbehavior in his office or trust, or for a willful neglect or violation of duty therein, or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.²

§ 105. Pennsylvania.—If any attorney at law shall misbehave himself in his office of attorney, he shall be liable to suspension, removal from office, or to such other penalties as have hitherto been allowed in such cases by the laws of the Common-

¹ Wait's N. Y. Code Civil Procedure, 1877, secs. 67-72.

² Ibid. sec. 14.

wealth. If he shall retain money belonging to his client after demand made by the client for the payment thereof, it shall be the duty of the court to cause the name of such attorney to be stricken from the record of the attorneys, and to prevent him from prosecuting longer in the court.¹

The several courts have power to make rules upon attorneys for the payment of money, and the delivery of deeds and other papers in their hands, belonging to their clients, and in every such case to enforce obedience to such rules by attachment.²

¹ 1 Brightly's Purdon's Dig. Pa. p. 100.

An attorney cannot be punished by suspension from his professional functions, for his contempt of process of the law, in neglecting to obey a subpoena. (*Commonwealth v. Newton*, 1 Gr. 453.) And an act, though highly discreditable, if not infamous, and unconnected with an attorney's duties, will not give the court jurisdiction to strike him from the roll; but an attempt to make an opposing attorney drunk, so as to obtain an advantage of him in the trial of a cause, is good ground for so doing. (*Dickens' Case*, 67 Pa. 169.)

Where an attorney has been removed for official misconduct, the supreme court seem to have no power to supervise the proceedings. (*McLaughlin's Case*, 5 W. & S. 272.)

² Brightly's Purdon's Digest, p. 100. An attorney who has collected money for his client has, however, a right to deduct his fees from the amount in his hands. If a rule be taken on him to pay over the money, the court will compel immediate justice, or inflict summary punishment on the attorney if the sum retained be such as to show a fraudulent intent; and in such case he forfeits all claim to compensation. But if the answer to the rule satisfy the court that it was held back in good faith, and believed by the attorney not to be more than an honest compensation, the rule will be discharged, and the client remitted to his action. (*Balsbaugh v. Frazer*, 19 Pa. 99.) He has no lien, however, upon a fund in court, even as against his client. (*Dubois' Appeal*, 38 Pa. 231.)

CHAPTER V.

PRIVILEGES OF ATTORNEYS AS OFFICERS OF THE COURT—
EXEMPTIONS.

- § 106. Privilege in general.
- § 107. Privilege from arrest.
- § 108. Privilege as to suing and being sued.
- § 109. Waiver of privilege.
- § 110. Privilege of counsel in argument.
 - § 111. Under control of the court.
 - § 112. Argument to be confined to the evidence.
 - § 113. Comments on persons and their actions.
 - § 114. Argument on the law.
 - § 115. Limiting time of argument.
 - § 116. Responsibility of counsel in argument.
 - § 117. Publication of argument.

§ 106. Privilege in general.—Attorneys properly admitted and enrolled are entitled to prosecute and defend all actions and suits at law and in equity, to prepare pleadings and other proceedings connected therewith, and generally to transact all that comes within the scope of their employment. They may usually practice in all inferior courts, unless the number of practitioners is limited in some way.¹ If an attorney is restrained or prevented from practicing where he has a legal right to practice, and without good cause, an action on the case may lie for the injury, and it is said, mandamus also, to swear the attorney into an inferior court.²

Regularly admitted and practicing attorneys were formerly supposed to be always present in court, and on that account have had various special privileges, some of which they still retain. These privileges concern chiefly the privilege from arrest, the privileges as to suing and being sued, exemptions from various civil duties, and the privilege of counsel in argument as

¹ *Davey's Case*, March, 141, pl. 214; *Hastings' Case*, 1 Mod. 23; 2 Keb. 477, pl. 10; *Gilman v. Wright*, 1 Sid. 410.

² *King v. Sheriff*, 2 Show. 154; 1 Sid. 410.

to words spoken. These privileges, however, are not allowed so much for the benefit of the attorney as for the protection of the client, whose rights might be jeopardized did the privileges not exist.¹ Thus, in England, when an attorney was plaintiff, he was formerly allowed in all personal actions to sue in his own court by attachment of privilege, and to lay and retain the venue in Middlesex, no matter where the defendant resided; and when defendant he cannot in general be arrested, but must be sued also in his own court, by bill. This is to prevent the injury that might otherwise result to the business of clients by the absence of attorneys, while going to other localities and attending other courts.²

The privileges of attorneys, as officers of the superior courts of Westminster, are very ancient, and were upheld for the sake of justice and for the benefit of the people of England. They were regarded, too, as the immemorial privileges of the court and the suitors, and not merely of the attorney, or of any particular client even. They only required that the attorney should be on the roll and qualified to practice, and seem to have belonged to an attorney in every court in which he might be admitted and enrolled.³ But the privileges do not attach in the case of proceedings by the executor or personal representative of the attorney.⁴ The privileges have been held to avail even against an immemorial local custom, a charter from the crown, or the general words of a statute, on the ground that they are the law of the courts in which they prevail, and therefore of sufficient force to control the operation of the common law itself, immemorial custom, or general act of Parliament.⁵

¹ *How v. Wooley*, 1 Vent. 1; 2 Wils. 44; 4 Burr. 2113; Doug. 381; *Gerrard's Case*, 2 W. Black. 1125; 2 Ves. 201.

² Doug. 313; 2 Chit. 63; 9 Price, 16.

³ *Welles v. Trahern*, Willes, 240; *Anderson's Case*, 1 Lev. 249; *Butt's Case*, 1 Roll. Abr. 489; *Gerard's Case*, 2 W. Black. 1125; *Gardner v. Jessup*, 2 Wils. 44; *Mayor v. Berry*, 4 Burr. 2116; *Prior v. Moore*, 2 Maule & S. 605; *Skirrow v. Tagg*, 5 Maule & S. 28; 9 Johns. 216; 1 Wm. IV, chap. 70, sec. 10; *Elkins v. Harding*, 1 Crompt. & J. 354; *Walker v. Rushberry*, 9 Price, 16; *Bowyer v. Hoskins*, 1 Younge & J. 199.

⁴ *Bishop v. Marsh*, 8 Scott, 128; *Scott v. Van Alstyne*, 9 Johns. 216.

⁵ *Prouse's Case*, Croke Car. 389; *Stevens' Case*, T. Raym. 180; *Stone's Case*, 1 Vent. 16-29; *Lodge's Case*, 2 Lev. 156, pl. 190; 1 Roll. Abr. 489; *Armington's Case*, Palmer, 403; *Joliffe v. Langston*, Ld. Raym. 342; *Kaye v. Denew*, 7 Term Rep. 671. But a privilege accruing *pendente lite* does not avail; and it is usual

The privileges cease when the reasons upon which they are founded cease, as if an attorney has retired from practice, or has been out of practice for a certain period. The attorney must be a practicing attorney to be entitled; for the presumption is, that the attorney is in court doing his duty.¹

As in England the attorneys of each court are supposed to be always present, attending the court on behalf of their clients,² their official duties in court are deemed to exempt them from filling many offices, such as mayor, alderman, sheriff, bailiff, overseer of the poor, rate collector, etc.,³ and they are also exempt from impressment,⁴ enlistment,⁵ or being sworn in as tithing-men, constables,⁶ or jurors. But it appears as to offices which may be performed by deputy, no such privilege is allowed.⁷ In Pennsylvania, an attorney has been considered exempt from serving as overseer of the poor, supervisor of the public roads, and constable, but not from militia duty.⁸

Attorneys, though retired from practice, are held in Massachusetts to be exempt from serving as jurors.⁹

§ 107. Privilege from arrest.—It was an ancient privilege of attorneys to be exempt from arrest on mesne process, or being held to bail, because—attorneys being obliged to attend officially, and, as the law presumed, continually, upon the courts—they were always amenable to their own courts, and could not be drawn away to attend others.¹⁰ But the statute (1 and 2

on the re-admission of attorneys to provide that they shall not take advantage of their privileges in any pending proceedings. (Moody's Case, Barnes, 42.)

¹ Maynard's Case, 2 Wils. 232; Anon. 1 Dowl. 208; 2 Johns. Cas. 102; Coleman, 133; Ogden v. Hughes, 2 South. 718; Brooks v. Bryant, 7 Term Rep. 25. See Skirrow v. Tagg, 5 Maule & S. 281; Prior v. Moore, 2 Maule & S. 605; Colt v. Gregory, 3 Cowen, 22.

² Walker v. Rushbury, 9 Price, 27.

³ Mayor v. Berry, 1 W. Black. 636; 4 Burr. 2109; Richmond's Case, 1 Barnes, 29; Respublica v. Fisher, 1 Yeates, 350.

⁴ Venable's Case, Cro. Car. 11.

⁵ Evington's Case, 2 Strange, 1143; Heaton's Case, 2 Barnes, 33. In New York, attorneys are not privileged from serving in the militia. (In re Bliss, 9 Johns. 347.)

⁶ Prouse's Case, Cro. Car. 389; Cower's Case, Noy, 112; 5 and 6 Vict. chap. 109, sec. 6.

⁷ Gerard's Case, 2 W. Black. 1125. See Stone's Case, 1 Lev. 265.

⁸ Respublica v. Fisher. 1 Yeates, 350.

⁹ In re Swett, 20 Pick. 1.

¹⁰ Beck v. Lasin 1 Tidd's Pr. 75; Wheeler's Case, 1 Wils. 298; Anon. Lofft, 151;

Vict. chap. 110) gave an unqualified power of arrest on a judge's order in case of parties about to go abroad. This destroyed the privilege of an attorney from arrest under such circumstances.¹

Nor do these privileges of an attorney extend to cases of indictments, informations, or suits on behalf of the crown; for it is said that it would be unreasonable that the court should allow protection to those who offend against the peace of the community and the interest of the government.²

An attorney is privileged from arrest while attending a court or a judge.³ An attorney, arrested at a coffee-house while attending a motion in court, has been discharged;⁴ so also where he was returning from attending a taxation of costs.⁵

A solicitor, arrested on his way from his residence to Lincoln's Inn Hall, without deviation, for the purpose of attending a bankrupt petition as solicitor, was discharged on personal examination, by the Lord Chancellor;⁶ and where a solicitor was arrested on his return from attending the master, the court ordered him to be discharged, not only in the original action, but from all subsequent detainers.⁷

In furtherance of justice, and for the protection of those who are engaged in its administration, attorneys are also generally privileged from arrest in civil suits while actually employed in the conduct or management of legal proceedings.⁸ They are, as

Lewis' Case, 2 Mod. 181; *Scott v. Van Alstyne*, 9 Johns. 216; 5 Wend. 90; *In re Emmet*, 2 Caines, 387; *Ogden v. Hughes*, 2 South. 718; *Fowler v. Hunt*, 10 Johns. 463; 4 Wend. 204; 1 *Ibid.* 32; 4 Call. 97; 9 Wend. 503.

¹ *Thomson v. Moore*, 1 Dowl. N. S. 283.

² *Kirkham v. Whaley*, 1 Ld. Raym. 27; *Rég. v. Payne*, 4 Leon. 1. It is said that an attorney cannot waive his privilege, because it is not allowed for his own sake, but for the sake of the client and the court. (*Scott v. Van Alstyne*, 9 Johns. 216; *Gardner v. Jessop*, 2 Wils. 42; *Farrill v. Head*, Barnes, 41.) But this is not universally the case.

³ *Garden v. Sheers*, 1 A. Pr. C. P. 60-102; *Long's Case*, 2 Mod. 181; *Newman v. Harrison*, Ca. Pr. C. P. 140.

⁴ *Griffith v. Brown*, Ca. Pr. C. P. 64.

⁵ *Morley v. Grubb*, *Ibid.* 104. But see *Maule v. Grubb*, 1 Barnes, 200.

⁶ *Gascoyne's Case*, 14 Ves. 183; *Castle's Case*, 16 Ves. 412.

⁷ *Ex parte Ledwich*, 8 Ves. 598; *Ex parte King*, 7 Ves. 312; *Moore v. Booth*, 3 Ves. 350; *Lidjier v. Birch*, 9 Ves. 69; *Baker v. Duncomb*, Skin. 549; 3 Lev. 398; *Comb.* 319; *Holt*, 590; *Duffy v. Oakes*, 3 Taunt. 166; *Ramsbottom v. Harcourt*, 4 Maule & S. 585.

⁸ *Ogden v. Hughes*, 2 South. 718; 5 Wend. 90; *Gibbs v. Loomis*, 10 Johns. 463; *Secor v. Bell*, 18 Johns. 52; *Corey v. Russell*, 4 Wend. 204; 1 Wend. 33; *Commonwealth v. Ronald*, 4 Call. 97; 9 Wend. 503; 4 Hill, 59.

a general rule, privileged from arrest, *eundo, morando, et redeundo*, from the court where the business is pending, and while attending a reasonable time at other places in furtherance of the business in hand, as while proceeding from a private residence to the office for papers, and from thence to court. A slight deviation from the direct road is not sufficient to destroy the protection thus afforded, though it is incumbent on the party arrested under such circumstances to account for the deviation.¹

When an attorney is arrested, and desires to set up his privilege, he should apply summarily to the court in which the business is pending, or the court out of which the process issued, for an order for his immediate discharge from that arrest, and the order should be served.

In England, an attorney is not privileged when the action is wholly at the suit of the king, or if he be sued in the exchequer as accountant to the king.² If an attorney sue or be sued as executor, or administrator, or bail, he may be proceeded against as a common person.³ Nor is he privileged from arrest if sued jointly with others, unless such other person is also privileged.⁴ Nor is he privileged if sued with his wife for a debt incurred by her *dum sola*, nor if he sues in right of his wife, or joins with her in the action.⁵ An attorney, to be privileged from arrest, must have the certificate required by law.⁶

An attorney actually attending court for the purpose of making a special motion, if arrested on a *ca. sa.* during his attendance, will be discharged from the arrest. The application for the discharge is necessarily *ex parte*. Notice need not be given to the attorney of the party suing out the execution. The rights

¹ Anon. Lofft, 434; Castle's Case, 16 Ves. 412; Gibbs v. Loomis, 10 Johns. 463; and cases cited *supra*; Gascoyne's Case, 14 Ves. 183; Williams v. Webb, 5 Scott N. S. 898; 12 Law J. N. S. C. P. 89; 2 Dowl. N. S. 660; Ricketts v. Gurney, 1 Chit. 682; 7 Price, 699; Attorney General v. Company, 7 Beav. 157. See Jones v. Rose, 11 Jur. 379.

² Com. Dig. Attorney B. 17; 2 Rol. Abr. 374; 3 Lev. 398.

³ Newton v. Rowland, Ld. Raym. 533; 12 Mod. 316; Taylor v. Fuller, Ca. Pr. C. P. 64.

⁴ Molyn v. Cooke, 1 Vent. 299; Dyer, 377; Poph. 379; 1 Salk. 544; 4 Maule & S. 585.

⁵ Roberts v. Mason, 1 Taunt. 254; Drew v. Rose, 2 Ld. Raym. 1398.

⁶ Dyson v. Birch, 4 Bos. & P. 4; Brooke v. Bryant, 7 Durn. & E. 25-26; Prior v. Moore, 6 Maule & S. 605; Skirrow v. Tagg, 5 Ibid. 281; Bernard v. Winnington, 1 Chit. 188.

of the party suing out the execution are not prejudiced by the discharge. After the privilege ceases, the same writ may be served, or a new execution may be issued. The parties stand in the same situation as though the defendant had never been arrested.¹ The privilege does not extend to the attorney while remaining at home, although he contemplates attending court.²

The privilege may be waived by the attorney, as where, instead of claiming the privilege, he told the officer to prepare a bail-bond, which he afterward executed. A counsellor has been held not to be privileged from arrest while attending before an examiner, master, or judge out of court.³ But in other cases the privilege has been extended to an attorney, while in attendance at the master's office taxing costs, as well as returning therefrom,⁴ and to one attending an arbitration,⁵ and to a solicitor while on his way to judge's chambers to attend a summons,⁶ and to a solicitor who had retired from practice, and who was taken on attachment for non-payment of costs in a chancery suit, whilst returning from attending an appeal in the House of Lords as agent for the appellant.⁷ The legislature may, by express words, take away the privilege, but it cannot be taken away by implication.⁸ An attorney's privilege from arrest does not extend to one about to leave the country,⁹ nor to one not engaged for either of the parties in a cause, but merely attending as the professional adviser of bail put in for the purpose of dissolving an attachment,¹⁰ nor to an attorney going to

¹ *Humphrey v. Cumming*, 5 Wend. 90.

² *Corey v. Russell*, 4 Wend. 204.

³ *Cole v. McClellan*, 4 Hill, 59.

That the privilege from arrest does not extend beyond the time of necessary attendance on court, see: *Fowler v. Hunt*, 10 Johns. 463; *Secor v. Bell*, 18 Johns. 52; *Foster v. Gansey*, 13 Johns. 465.

⁴ *In re Hope*, 9 Jur. 856.

⁵ *Webb v. Taylor*, 1 Dowl. & L. 676; 8 Jur. 39.

⁶ *In re Jewett*, 10 Jur. N. S. 814; 33 L. J. Ch. 730; 33 Beav. 559; 12 Week. R. 945; 10 L. T. N. S. 256.

⁷ *Attorney General v. Skinners' Co.* 8 Sim. 377. See *Clutterbuck v. Hulls*, 4 Dowl. & L. 80; 1 B. C. R. 165; 10 Jur. 1082; 14 Law J. Q. B. 310; *Strong v. Dickinson*, 5 D. P. C. 86; 1 Mees. & W. 488; 2 Gale & D. 83. The bar of Georgia is not privileged from arrest on a *ca. sa.* (*Elam v. Lewis*, 19 Ga. 608.)

⁸ *In re Bliss*, 9 Johns. 346.

⁹ *Thompson v. Moore*, 1 Dowl. N. S. 283; 5 Jur. 1009; *Flight v. Cook*, 1 Dowl. & L. 174; 13 Law J. Q. B. 78.

¹⁰ *Jones v. Marshall*, 2 Com. B. N. S. 615; 3 Jur. N. S. 916; 26 Law J. Com. P. 229.

attend a client in a court in which he has not been admitted to practice,¹ nor to the managing clerk of the attorney, while going to attend before a judge at chambers, on business of his master,² nor to an attorney not actually practicing.³

§ 108. Privilege as to suing and being sued.—At common law, an attorney had, in all personal actions, the right of suing in the court of which he was an attorney, by an *attachment of privilege*; and having brought the defendant before the court by that writ, he might have declared against him, and proceeded in the action as in ordinary cases.⁴ This process has not generally been in use in America. It is referred to in an old case as being once in use in New York.⁵ And now, even in England, the right is abolished by statute, and an attorney must sue like any other person. As defendant, also, the attorney had the privilege, in England, of being sued by *bill*, in the court in which he practiced. The effect was that, while he continued to practice, he could in no case be arrested upon *mesne* process, nor held to bail, even though it should appear that he was about to quit the kingdom, though this did not apply to an arrest on a *capias ad satisfaciendum*; his exemption from arrest on final process existing only during his attendance on a cause.⁶

Attorneys have also, in England, peculiar privileges in regard to venue. But to avail themselves of this, they must sue in person as attorneys, and not as ordinary persons by other attorneys.⁷ In *King v. Burr*, (20 Johns. 274) in New York, a similar privilege was claimed, but denied, yet seems to have formerly existed.⁸

The object was to prevent attorneys from being called away

¹ *Price v. Clutterbuck*, 1 Fost. & F. 379.

² *Phillips v. Pound*, 7 Ex. 881; 16 Jur. 645; 21 Law J. Ex. 277.

³ *Anon.* 4 Moore & P. 810; 1 D. P. C. 208. The privileges of an attorney do not protect him from the consequences of procuring or advising a judicial officer to commit an injurious act beyond the limits of his authority, however correct the intentions and motives of the attorney may be. (*Revill v. Petitt*, 3 Met. Ky. 314.)

⁴ *Pitcher v. Sheriff*, 2 Marsh. 152.

⁵ *Allaire v. Ouland*, 2 Johns. Cas. 52.

⁶ *Brook v. Bryant*, 7 Term Rep. 25; *Redman's Case*, 1 Mod. 10.

⁷ *Partington v. Woodcock*, 2 Dowl. O. S. 550; *Burn v. Passmore*, 1 Ibid. 17; *Bradshaw v. Burton*, 7 Ibid. 329; *Harrington v. Page*, 2 Ibid. 164; *Lawless v. Timms*, 3 Ibid. 707; *Pye v. Leigh*, 2 W. Black. 1065.

⁸ *In re Emmet*, 2 Caines, 387.

into other courts, and therefore the attorneys at Westminster have been allowed these particular privileges in regard to their necessary attendance on those courts, viz: to sue and be sued in their own respective courts, and an exemption, with some exceptions, from being impleaded elsewhere. These privileges arose from the supposition that the business of their clients would suffer by their being drawn elsewhere.¹

In suits against them they might be sued by bill in their own courts, setting forth the cause of action; as they were always presumed to be present, each court had, at common law, original jurisdiction over them.² They have had the power of retaining the venue of all actions in which they are personally interested as plaintiffs in the county of Middlesex, where the superior courts are held; as the venue, when properly laid in Middlesex, cannot be changed, though the cause of action arose in another county, or the witnesses all reside there.³ Where the plaintiff and defendant are both attorneys of the same court, the defendant is entitled to be sued by bill, and if not so sued, he may plead his privilege in abatement, or the court, on motion, will stay the proceedings.⁴ Where an attorney was sued by common process, on a bill of exchange, the plaintiff being also an attorney, the court set aside the proceedings with costs.⁵ When the plaintiff and defendant are both attorneys, and of different courts, the plaintiff's privilege prevails, and he may sue in his own court.⁶

¹ *Beck v. Lewin*, 1 Tidd's Pr. 75; *Wheeler's Case*, 1 Wils. 298; *Anon. Lofft*, 151; *Bac. Abr. Priv. B.* 15 Johns. 242; 16 Johns. 332; 2 Wend. 257; *In re Emmet*, 2 Caines, 387; 1 Johns. Cas. 32; 3 Cow. 368. See as to service of papers, etc., in suits against attorneys in New York: *Bank v. Sherwood*, 16 Johns. 43; *Backus v. Rogers*, 8 Johns. 346; *Hallenback v. Whitaker*, 17 Johns. 1; *Lawrence v. Warner*, 1 Cowen, 98; *Brown v. Childs*, 17 Johns. 1; *Little v. Kellogg*, 18 Wend. 528.

² 4 Inst. 71; *Lonsdale v. Littledale*, 2 H. Black. 270; 9 Johns. 216; 2 Caines, 387; 2 Johns. Cas. 102; *Coleman*, 133; 10 Johns. 463; 3 Cowen, 368; 4 Hall, 59; *Butt's Case*, 1 Rolls Abr. 489; *Prouse's Case*, Cro. Car. 389; *Hussey v. Jordon*, Doug. 381; *Ailway v. Burrows*, Doug. 363; *Dyer v. Levy*, 4 Dowl. 630; *Lewis v. Kerr*, 2 Mees. & W. 226; S. C. 5 Dowl. 447; *Pitt v. Pocock*, 2 Cromp. & M. 146; 1 Tyrw. 85; *Board v. Parker*, 7 East. 47; *Johnson v. Bray*, 2 Brod. & B. 698.

³ *Pye v. Leigh*, 2 W. Black. 1065; *Barnes*, 479, note; 2 Salk. 668; *Pitcher v. Monmouth*, 2 Marsh. 152; *Partington v. Wood*, 2 Dowl. 550. See *Fisher v. Fielding*, 1 Price, 384.

⁴ *Barber v. Palmer*, 6 Durn. & E. 524; 8 Ibid. 395; Tidd's Pr. 82.

⁵ *Atkins v. —*, 1 Chit. 63.

⁶ 4 Dowl. & R. 73; 1 W. Black. 19; 2 Ibid. 1325.

The privileges as to suing were restrained to those suits only which the attorneys brought in their own right, or which were brought against them in their own right; for if they sued or were sued in a representative character, as executors, administrators, assignees, etc., they then represent ordinary persons, and were not entitled to privilege.¹ But the cause of action need not have accrued to or against the attorney in his official or professional character. The privilege equally attached if the action arose out of the conduct of the attorney in his private capacity.²

An attorney who had ceased to practice a year and had entered the army, was held to have lost his privilege as to being sued. The absence must be by betaking himself to a profession or business incompatible with his practice as an attorney. If it is in consequence of any temporary absence he will not lose his privilege. Attendance is the ground and foundation of the privilege. The object is, that attorneys may not be drawn into other courts, or to other business, to the injury of suitors.³

Whenever, in England, an attorney has had the privilege of being sued exclusively in his own court, a person who was attorney of two superior courts might be sued in either, at the option of the plaintiff.⁴ An attorney sued jointly with an unprivileged person appeared to lose his privilege.⁵

§ 109. Waiver of privilege.—An attorney might waive his privilege, either when plaintiff, by suing as a common person, or

¹ Gage's Case, Hob. 177; Pole's Case, Godb. 10; Anon. Latch, 199.

² *Newton v. Rowland*, 12 Mod. 316; Salk. 2, pl. 4; 1 Ld. Raym. 533; *Drew v. Rose*, 2 Ld. Raym. 1398; *Keeley v. Lynch*, 9 Ir. L. R. 563; *Duffy v. Oakes*, 3 Taunt. 166.

³ *Brooks v. Patterson*, 2 Johns. Cas. 102; 3 Cowen, 22. But see *Ogden v. Hughe*, 2 South. 718, where an attorney was held privileged from arrest unless the privilege was taken away by rule, though he did not show that he had acted as attorney within a year.

⁴ *Walford v. Fleetwood*, 14 Mees. & W. 449; 3 Dowl. & L. 65; *Hunter v. Neck*, 3 Scott N. R. 448; 3 Man. & G. 181; 14 Law J. Ex. 271; *Groom v. Wortham*, 2 Dowl. N. S. 657; 5 Scott N. R. 799; 12 Law J. Com. P. 88. See *South Staffordshire R. R. Co. v. Smith*, 1 Lown. M. & P. 515; 5 Ex. 472; 19 Law J. Ex. 356; *Grace v. Wilmer*, 6 El. & B. 982; 3 Jur. N. S. 64; 26 Law J. Q. B. 1.

⁵ *Rastriek v. Beckwith*, 2 Dowl. & L. 624; 8 Scott N. R. 716; 7 Man. & G. 905; 3 Jur. 1030; 14 Law J. Com. P. 1; *Robarts v. Mason*, 1 Taunt. 254; but see *Ramsbottom v. Harcourt*, 4 Maule & S. 585. See as to the privilege of suing in the superior courts: 9 and 10 Vict. chap. 95; 10 and 11 Vict. chap. 71; 12 and 13 Vict. chap. 101, sec. 18; *Jones v. Brown*, 2 Ex. 329; 5 Dowl. & L. 716; 12 Jur. 380.

when defendant, by not claiming it in due time, or in a proper manner.¹ But in New York, where it seems to have once existed, an attorney, to get rid of his privilege, was compelled to apply to the court, and was not allowed to waive it without an order.² If he waived his privilege, he could not afterward resume it.³

§ 110. Privilege of counsel in argument.—"The benefit of the constitutional right to counsel depends very greatly on the freedom with which he is allowed to act, and to comment on the facts appearing in the case, and on the inferences deducible therefrom. The character, conduct, and motives of parties and their witnesses, as well as of other persons more remotely connected with the proceedings, enter very largely into any judicial inquiry, and must form the subject of comment, if they are to be sifted and weighed. To make the comment of value, there must be the liberty of examination in every possible light, and of suggesting any view of the circumstances of the case, and of the motives surrounding it, which seems legitimate to the person discussing them. It will often happen in criminal proceedings, that while no reasonable doubt can exist that a crime has been committed, there may be very great doubt whether the prosecutor or the accused is the guilty party; and to confine the counsel for the defense to such remarks concerning the prosecutor as he might justify if he had made them without special occasion, would render the right to counsel, in many cases, of no value. The law, justly and necessarily, in view of the importance of the privilege, allows a very great liberty in these cases, and surrounds them with a protection that is always a complete shield, except where the privilege of counsel has been plainly and palpably abused."⁴

¹ *Hern v. Howard*, 1 W. Black. 231; *Hetherington v. Lowth*, 2 Strange, 837; *Poulton v. Goddard*, 1 Comb. 143; *Welland v. Truman*, 1 Bos. & P. 629; *Seaman v. Dee*, 2 Lev. 39; 1 Vent. 198; *Dent v. Lambert*, Barnes, 479.

² *Scott v. Van Alstyne*, 9 Johns. 216. See *Cole v. McClellan*, 4 Hill, 59.

³ *Dyer*, 287. See *Fogg v. Madan*, 1 Bos. & P. 629; *Parker v. Vaughan*, 2 Bos. & P. 29; *Unwin v. Robinson*, Barnes, 53; *Bands v. Bodiner*, Carthew, 377; *Jones v. Bodeenor*, 1 Ld. Raym. 135.

⁴ *Cooley's Const. Lim.* *443; *Brook v. Montague*, Cro. Jac. 90. Approved and applied in *Hodgson v. Scarlett*, 1 Barn. & Ald. 232. See also *Mackay v. Ford*, 5 Hurl. & N. 792; *McMillan v. Birch*, 1 Bin. 178.

An attorney, therefore, in the discussion of his client's cause, is not liable for words spoken or written relative to the matters in controversy, or subjects which incidentally arise in the course of the trial. And no action will lie for such speaking or writing, however false, defamatory, or malicious may be the words, provided the matter was material to the issue or inquiry before the court.¹ But if an attorney wantonly departs from the evidence and point in issue, with an intent to injure the character of the adversary or that of others, without propriety or probable ground, he is responsible.²

To say that no responsibility attaches, however false or malicious the words may be, seems to be stating the rule broadly; but, with the proviso above mentioned, it is fully sustained by the authorities.

Chief Justice Shaw has stated the rule as follows: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of the inquiry. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves; but whether they were spoken in the course of judicial proceedings, and whether they are relevant or pertinent to the cause or subject of the inquiry. And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings with which a party or counsel, who naturally and almost necessarily identifies himself with his client, may become animated by constantly regarding one side only of an interesting and animated controversy in which the dearest rights of such party may become involved."

The limit to the privilege was considered by him to be this:

¹ *Newfield v. Copperman*, 15 Abb. Pr. N. S. 360; *Marsh v. Ellsworth*, 36 How. 532; 1 *Sweeny*, 52; *Garr v. Selden*, 4 N. Y. 91; *Commonwealth v. Culver*, 1 Pa. L. J. R. 361.

² *Ibid.*; *Marsh v. Ellsworth*, 50 N. Y. 309; *Ring v. Wheeler*, 7 Cowen, 725; *Hastings v. Lusk*, 22 Wend. 410; *Gilbert v. People*, 1 Denio, 41.

That a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting the cases and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions.¹

The privilege accorded to advocates has always been very great while they are actually commenting upon the conduct of parties, in any case in which they are engaged as counsel. The extent of the privilege has been asserted in very broad terms. And in *Wood v. Gunston*, Styles, 462, it was said, "that if a counsel speaks scandalous words against one in defending his client's cause, an action lies not against him for so doing, for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." But this is not the true reason; and Lord Ellenborough, in repudiating this doctrine, and commenting on its injustice, said:² "If an action be brought against a counsel then, according to that case, he is justified, because it will be intended that he spoke by the information of his client, and if an action be brought against the client, he may justify by showing that he gave no such information to his counsel. So that, if that case were law, an injured party would be without remedy. There must be some limit laid down." In this case, an attorney named Hodgson brought an action against Scarlett, afterward Lord Abinger, who had, at the trial of a cause in which the former acted as attorney for the plaintiff, described him, in his address to the jury, as "a fraudulent and wicked attorney." The court decided the action not maintainable. Lord Ellenborough, in delivering the judgment, used the following language: "A counsel, intrusted with the interests

¹ *Hoar v. Wood*, 3 Met. 197; *Padmore v. Lawrence*, 11 Ad. & E. 380; *Ring v. Wheeler*, 7 Cowen, 725; *Mower v. Watson*, 11 Vt. 356; *Gilbert v. People*, 1 Denio, 41; *Hastings v. Lusk*, 22 Wend. 410; *Bradley v. Heath*, 12 Pick. 163; *Warner v. Paine*, 2 Sand. Ch. 195; *Garr v. Selden*, 4 N. Y. 91; *Jennings v. Paine*, 4 Wis. 358.

² *Hodgson v. Scarlett*, 1 Barn. & Ald. 238.

of others, and speaking from their information, for the sake of public convenience, is privileged in commenting fairly and *bona fide* on the circumstances of the case, and in making observations on the parties concerned, and their instruments or agents in bringing the cause into court. Now, the plaintiff in this case was not merely the attorney, but was mixed up in the concoction of the antecedent facts, out of which the original cause arose; he was cognizant of all the circumstances, and knew that the plaintiff had no ground of action in that case, in consequence of having already received more than the amount demandable by him. It was in commenting on this conduct that the words were used by the defendant. He had a right so to comment, for the plaintiff was mixed up with the circumstances of the case, and was the agent and instrument in the transaction. The defendant then says that he is a fraudulent and wicked attorney. These were words not used at random and unnecessary, but were a comment upon the plaintiff's conduct as attorney. Perhaps they were too strong—it may have been too much to say that he was guilty of fraud as between man and man, and of wickedness *in foro divino*. The expression, in the exercise of a candor fit to be adopted, might have been spared. But still a counsel might, *bona fide*, think such an expression justifiable under the circumstances. It appears to me that the words spoken were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable." This decision is based upon two leading grounds, viz., (1) the information given by the client, and (2) its relevancy to the cause.

Still older authorities have made the same distinctions. In the reign of James I,¹ Sir Henry Montague pleaded, in an action brought against him, that he had spoken certain words complained of as *consiliarius et peritus in lege*. The court adjudged that "a counsellor in law retained, hath a privilege to enforce anything which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false; but it is at the peril of him who informs it, for a counsellor is at his peril to give in

evidence that which his client informs him, being pertinent in the matter in question, otherwise action upon the case lies against him by his client, as Popham said; but if he give in evidence anything not material to the issue which is scandalous, he ought to aver it to be true, otherwise he is punishable; for it shall be contended as spoken maliciously and without cause; which is good ground for an action."

The doctrine attributed to Popham was doubtless the law in very early times, and action on the case would probably lie, if a counsellor refused "to give in evidence that which his client informed him."¹ Afterward, however, it was expressly decided to the contrary, on the ground that the law looked upon the services of a counsel as given *gratuitously*, so that he is not answerable for any neglect or default in the conduct of a cause.

Going several lengths further upon the question of immunity of counsel at a trial, Mr. Justice Bayley, in a later case,² said: "The speech of a counsel is privileged by the occasion on which it is spoken; he is at liberty to make strong, even calumnious observations against the party, the witnesses, and the attorney in the cause. The law presumes that he acts in discharge of his duty, and in pursuance of his instructions, and allows him this privilege, because it is for the advantage of the administration of justice that he should have free liberty of speech. But the privilege is confessedly confined to the utterance of the words complained of in a court of justice. If the counsel who has spoken them, or any one else, afterward publishes or repeats them out of court, he becomes liable to an action. The privilege is strictly one of counsel in court. It was decided in the case of *Flint v. Pike*, 4 Barn. & C. 480, that, although any one is at liberty to publish a history of the trial, that is, of the facts of the case, and of the law as applied to those facts, he is not at liberty to publish observations made by counsel injurious to the character of individuals.'"

The privilege, then, of argument by counsel appears to be established by precedent and guaranteed by constitutional law. Counsel represents a party. He is recognized as constituting an

¹ Rolle's Abridg. 91.

² *Flint v. Pike*, 4 Barn. & C. 478.

element in judicial investigation. His right to participate, in behalf of his client, in the examination of witnesses and in argument to the jury, is fully assured. A party to a suit is not compelled to employ counsel to conduct it, but has usually a constitutional right to appear *in propria persona*.¹ In a case in Georgia,² there was an assignment of error, because the court below charged the jury that in determining the question they were not "to look to the argument of counsel." The court said: "They must *look* to the argument of counsel. Parties have a right to appear by counsel, and it is the privilege of counsel to address the jury on the facts. If the jury are to disregard the argument of counsel altogether—if they are to shut their ears to their illustrations, comments, and reasonings—how unmeaning, indeed, how absurd, is the appearance of counsel. It is a most valuable right to be represented by learned and eloquent counsel, not only before the court as to the law, but also before the jury as to the facts. * * * The true view of the position of counsel before the jury is that of aids or helps. They are officers of the court, amenable to its authority, subject to its correction, and restrained by usages of honor and courtesy, which, however in some instances disregarded, are as ancient in their origin, and as potent for good, and as generally respected as any usages which belong to any class of the highest grade of civilized man. The duties of the advocate are among the most elevated functions of humanity. It is the business of the jury to listen, to be informed, but not to obey."

§ 111. Argument of counsel under control of the court. The privilege of counsel as to argument being understood, it is also to be borne in mind that the right is to be exercised under the control and direction of the court. The determination of the question as to what shall be admitted in argument to the jury, outside of the facts brought out in evidence, the degree of invective allowed to counsel, and the time during which the argument may continue, have generally been considered subject to judicial regulation.³

¹ *May v. Williams*, 17 Ala. 23.

² *Garrison v. Wilcoxson*, 11 Ga. 154; *Proffatt on Trial by Jury*, sec. 248, and note.

³ *State v. Hamilton*, 55 Mo. 520; *State v. Waltham*, 48 Mo. 55; *Proffatt on Trial by Jury*, sec. 249. See *Trial of Dean of St. Asaph*, 21 How. St. Tr. 817.

§ 112. The argument of counsel is also to be confined to the evidence.—Counsel must confine themselves to the facts in evidence. This is a rule frequently violated. It is the duty of a court to check any departure from the evidence, and to stop counsel when he introduces irrelevant matters, or facts not supported by the evidence.¹

If an objection be made to this course of argument, it is error for the court to permit it, and a new trial may be granted for such error; but where counsel for the State made comments outside of the evidence, and no objection was made, it was held not error.² It has been said that a court may refuse to allow a plaintiff's counsel to argue a case before the jury, there being no evidence in the cause legally sufficient from which they can legitimately find a verdict for the plaintiff.³

At times, the court should not wait for the objection of the opposite party when a counsel commits a flagrant breach of the rule, as where a counsel attempts surreptitiously to get before the jury facts which have not been proven, and where an attorney, in arguing his cause on his own account, gave an account of an attempt by a person not a party to the record to assassinate him.⁴ But where there is a conflict of testimony, it is not error for the court to permit counsel to state to the jury the facts as proved, according to his view of the case.⁵

In the exercise of this power to control counsel, and to stop and correct him when the purport of the evidence is mistaken, a court should not express its opinion on the facts of the case. It has been held error to permit counsel to read and comment upon, as part of the argument to the jury, the minutes of evidence taken at a former trial between the same parties.⁶

§ 113. Comments on persons and their actions.—A judge has power to stop an attorney who abuses his privilege in

¹ *Dickerson v. Burke*, 25 Ga. 225; *Doster v. Brown*, *Ibid.* 24; *Bullock v. Smith*, 15 *Ibid.* 395; *Cook v. Ritter*, 4 E. D. Smith, 253; *Lloyd v. Hannibal R. R. Co.* 53 Mo. 509.

² *Tucker v. Henniker*, 41 N. H. 317; *Davis v. State*, 33 Ga. 98.

³ *Bankard v. Baltimore R. R. Co.* 34 Md. 197.

⁴ *Berry v. State*, 10 Geo. 511; *Saunders v. Baxter*, 6 Heisk. 369.

⁵ *Hotcher v. State*, 18 Ga. 460; *McNab v. Lockhart*, *Ibid.* 495; *Proffatt on Trial by Jury*, sec. 250.

⁶ *Proffatt on Trial by Jury*, sec. 250; *Bill v. People*, 14 Ill. 432; *Martin v. Orndorff*, 22 Iowa, 505.

commenting on a witness and his testimony. This power is usually exercised sparingly, but it should be exercised promptly and firmly when the abuse is gross—as where a counsel commented on a prisoner not giving evidence in his own behalf, it was held error for the court to allow it, and a new trial was granted.¹ So where a defendant in a criminal case has not produced any evidence to sustain his general reputation and moral character, it is improper for counsel to argue to the jury that his failure to do so may be considered against him.² But certain acts of a party tending to show bad faith and dishonest dealing on his part, are properly the subjects of comment to the jury. So where a defendant, being asked if he had not disposed of his property to avoid a recovery in the action, and had not since attempted to sell the same property, it was considered proper to comment on his answers.³

The boundaries that separate legitimate argument by illustration, from an attempt to covertly introduce facts bearing on the case unconnected with the evidence, constitute a question that must be decided on many occasions by the court in its discretion. It has been said that an advocate, however unrestricted he may or ought to be in the use of all the forms of rhetoric, such as invective, satire, ridicule, or humor, and every variety of illustration drawn from the facts in evidence, or from facts hypothetically assumed, ought not to be allowed to make himself a witness, and state facts within his own knowledge touching the case under discussion.⁴

§ 114. Argument on the law.—Whether an argument on the law of the case can be made to the jury has been doubted. It has been held that it should not be permitted when the court

¹ Proffatt on Trial by Jury, sec. 252; *Crandall v. People*, 2 Lans. 309; *State v. Williams*, 65 N. C. 505; *Jenkins v. Ore-Dressing Co.* Ibid. 563; *Derries v. Haywood*, 63 N. C. 53.

² *Fletcher v. State*, 49 Ind. 124.

³ Proffatt on Trial by Jury, sec. 252; *State v. Lassiter*, 70 N. C. 462. The non-introduction of a settlement on which it is relied that a note, the subject of the action, was brought into account and satisfied, is a proper circumstance for comment before the jury, on the trial for the recovery of the amount of the note. (*Chambers v. Brigman*, 68 N. C. 274; *Gray v. Burk*, 19 Tex. 228; *Cross v. Garrett*, 35 Iowa, 480.

⁴ Proffatt on Trial by Jury, sec. 250; *Bell v. People*, 14 Ill. 432.

is asked for a statement of the law and gives it to the jury as authoritative, and the court may rightly prevent the counsel for the defense from arguing the constitutionality of a law to the jury.¹ The practice of counsel in presenting their views of the law to the jury is subject to a correction afterward, when the court gives instruction to the jury; but a court can generally interfere and stop a counsel in an argument of law to the jury when its own opinion is fixed, and in such case it seems that it may interfere to the extent of refusing to allow any argument at all.²

In civil cases counsel have a right to present their views of the law so as to discuss the facts intelligently to the jury.³ Arguments should be restricted to a discussion of the facts of the case, and the conclusions legitimately deducible from the law applicable to them.⁴

In the latitude allowed to counsel, courts may impose some reasonable restraints upon the address to the jury. It has been held that, even though the jury are the judges of the law in criminal cases, the court may refuse to allow counsel to read law-books to the jury.⁵ Still, it is preferable in such cases to err on the side of liberality; and restrictions which do not leave to counsel, who are apparently acting in good faith, such reasonable time and opportunity as they may deem necessary for presenting their client's case fully, may be so far erroneous as to warrant setting aside a verdict of guilty.⁶ The right of counsel to address the jury on questions of law in criminal cases, is still in dispute. If by the local law the jury are the judges both of law and fact, there appears no good reason why counsel should not be allowed to address them upon the law.⁷ But the contrary is held in Maryland,⁸ where counsel is not allowed to argue the

¹ Proffatt on Trial by Jury, sec. 253; *Davenport v. Commonwealth*, 1 Leigh, 588; *Delaplane v. Crenshaw*, 15 Gratt. 457; *Franklin v. State*, 12 Md. 236.

² *Robinson v. Adkins*, 19 Ga. 398; *Howell v. Commonwealth*, 5 Gratt. 664.

³ *McMath v. The State*, 55 Ga. 303; *Warmock v. State*, 56 Ga. 503; *Ransone v. Christian*, *Ibid.* 353.

⁴ *Thompson v. State*, 43 Tex. 268.

⁵ *Murphy v. State*, 6 Ind. 490. See *Lynch v. State*, 9 Ind. 541; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501.

⁶ *People v. Keenan*, 13 Cal. 581.

⁷ *Lynch v. State*, 9 Ind. 541; *Murphy v. State*, 6 Ind. 490. See *Trial of Col. Lilburne in 1649*, 4 How. St. Tr.

⁸ *Franklin v. State*, 12 Md. 236. See also *United States v. Callendar*, Whart. St. Tr. 688.

constitutionality of a statute to the jury ; and the constitution, in making the jury judges of the law as well as of the facts, does not empower them to decide a statute invalid. In Massachusetts, where, as in other localities, the jury is supposed to receive the law from the court, it is nevertheless held that counsel has a right to address them upon the law.¹

It is often the habit of counsel to read extracts from authorities to the jury. There are times when a court may rightfully deny the privilege, as where a counsel proposed to read to the jury an adjudication by the highest court of another State, ruling that a statute, similar to that upon which the indictment was founded, was contrary to the constitution of the State.² The matter seems to be in the discretion of the court, and it may refuse to allow an unnecessary consumption of time.³

The general rule appears to be to permit extracts from text-books to be read in argument by way of illustration merely. The court, however, should instruct the jury that such extracts are not evidence. When it deems the doctrine erroneous, it is to so instruct the jury. It is said in a California case that the "practice of allowing counsel, in either a civil or a criminal action, to read law to the jury, is objectionable, and ought not to be tolerated. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases, or extracts from text-books, subject to the sound discretion of the court, whose duty it is to check promptly any effort on the part of counsel to disregard the instructions, or to take the law of the case from the books rather than from the court." ⁴

The privilege of argument should not be abused ; but considerable latitude is generally allowed, both at the English common law and in the American courts.⁵

¹ *Commonwealth v. Porter*, 10 Met. 263; *Commonwealth v. Austin*, 7 Gray, 51.

² *Commonwealth v. Murphy*, 10 Gray, 1; *Commonwealth v. Porter*, 10 Met. 63; *Lloyd v. Hannibal & Co.* R. R. Co. 53 Mo. 514.

³ *Mayfield v. Cotton*, 37 Tex. 229.

⁴ *Proffatt on Trial by Jury*, sec. 251; *People v. Anderson*, 44 Cal. 65; *Fuller v. Talbot*, 23 Ill. 357; *Sprague v. Craig*, 51 Ill. 288; *Harvey v. State*, 40 Ind. 516; *Yoe v. People*, 49 Ill. 410; *Cory v. Silcox*, 6 Ind. 39; *Kenyon v. Sutherland*, 3 Gilm. 99; *Legg v. Drake*, 1 Ohio St. 286.

⁵ *McNobb v. Lockhart*, 18 Ga. 507.

§ 115. Limiting time of argument.—It is the frequent practice of the courts to prescribe, in civil cases, and in criminal trials for minor offenses, the length of time a counsel shall take up in argument. The exercise of this discretion is supported. Yet the authority of the court must be to some extent circumscribed, otherwise it might be so exercised as to abridge too much the privilege of counsel in argument.

In a slander case, the court has limited the argument to an hour and a half on one side and an hour on the other, and on appeal this was held no abuse of discretion.¹ But in graver charges, for higher offenses, the action of the court will be more jealously watched, as it is a constitutional right to have counsel argue to the jury. It was therefore held, in the case of a charge for an assault with intent to murder, and where the counsel was limited to forty minutes in the argument to the jury, that this was error, in view of his protest that he could not do justice to his client in that space of time.² In a trial for shooting with intent to kill, a limitation of the argument for the defense to five hours has been sustained.³ In a California case, the defendant was tried for a capital offense, and his counsel was restricted in his argument to one hour and a half. This was held, on appeal, to be an improper restriction, and the decision was placed on constitutional grounds, inasmuch as such action deprived the prisoner of the opportunity of a full defense, which was his constitutional right. A late decision in North Carolina, in a case of a charge for murder, where an hour and a half was fixed, and the restriction sustained, is probably not law.⁴ The refusal of the court to permit counsel to proceed in addressing the jury is not error, unless excepted to.⁵

§ 116. Responsibility of counsel in argument.—As long as counsel confine themselves to the issues, they are privileged

¹ Proffatt on Trial by Jury, sec. 254; *Musselman v. Pratt*, 44 Ind. 126; *Dobbins v. Oswalt*, 20 Ark. 619; *Freligh v. Ames*, 31 Mo. 253; *State v. Page*, 21 Mo. 257; *Lynch v. State*, 9 Ind. 541; *Wood's Case*, 7 Leigh, 743.

² *Hunt v. State*, 49 Ga. 255.

³ *Weaver v. State*, 24 Ohio N. S. 584.

⁴ Proffatt on Trial by Jury, sec. 254; *People v. Keenan*, 13 Cal. 581; *State v. Collins*, 70 N. C. 241.

⁵ *Wilkins v. Anderson*, 11 Pa. 399.

to comment upon individuals without being liable in an action against them. Words, either spoken or written, in a legal proceeding, they being pertinent and material to the controversy, are privileged. This is the general rule,¹ but counsel cannot go outside of the case and make slanderous attacks upon a party. If he does, he is no more privileged than any other person, and is liable. An attorney in defending his client from a charge of assault in turning out the plaintiff from certain premises in which he had agreed to sell wine under agreement with a certain party, stated that that party had sufficient reasons for determining the agreement, and that he had been plundered by the plaintiff to a frightful extent. This was held a statement connected with the transaction, and an inference from the facts, and was privileged.² And so, where a party was alleged to have kept a sum of money, which by his contract he ought not to have kept, counsel used the language, "he has defrauded us," this was held privileged.³ The subject has been already discussed in a preceding section while considering the general privilege of counsel in argument.

§ 117. Publication of argument.—There is, however, a well-defined difference between the rules of law which protect communications, because of the occasion on which they are made and the duty resting upon the person making them, and those rules which concern the spreading before the world the same communications. It does not follow, because a counsel may freely speak in court as he believes, or is instructed, that therefore he may publish his speech through the public press. The privilege in court is necessary to the complete discharge of his

¹ Proffatt on Trial by Jury, sec. 255; *Garr v. Selden*, 4 N. Y. 91; *Lea v. White*, 4 Sneed, 111; *Jennings v. Paine*, 4 Wis. 358; *Parker v. Mitchell*, 31 Barb. 469; *Hoar v. Wood*, 3 Met. 193; *Hodgson v. Scarlett*, 1 Barn. & Ald. 232; *McMillan v. Birch*, 1 Binn. 178; *Brook v. Montague*, Cro. Jac. 90.

² *Mackey v. Ford*, 5 Hurl. & N. 792.

³ *Needham v. Dowling*, 15 Law J. Com. P. 9. See *ante*, § 110. Where a person, appearing for himself, applied to the court for an extension of time to file a transcript on appeal, and in the application went outside of the reason for asking the order, which was an accident to himself that disabled him from preparing the transcript, and charged his attorney in the court below with collusion with the adverse attorney, this was held not privileged, and was also held to be libelous *per se*. (*Wyatt v. Buell*, 47 Cal. 624.)

duty to his client, but when the suit is ended, that duty is discharged, and he is not called upon to appeal from the court and the jury to the general public. Still, it seems settled that a fair and impartial account of judicial proceedings which have not been *ex parte*, but in the hearing of both parties, is, generally speaking, a justifiable publication.¹ A further discussion, however, of this subject, would lead us too far into the law of libel, to which the matter properly belongs.

¹ *Hoare v. Silverlock*, 9 Com. B. 20; *Lewis v. Levy*, El. Bl. & El. 537; *Ryalls v. Leader*, Law R. 1 Ex. 296; *Stanley v. Webb*, 4 Sand. 21; *Cincinnati Gaz. Co. v. Timberlake*, 10 Ohio N. S. 548. See *Rex v. Carlisle*, 3 Barn. & Ald. 167; *Rex v. Creavey*, 1 Maule. & S. 273, as to indecent and blasphemous publications. See also *Cooley's Const. Lim.* *449 *et seq.* As to publication of speech of client, reflecting on counsel, see *Sandford v. Bennett*, 24 N. Y. 20. And upon the general subject, *Townshend on Libel and Slander*, 3rd ed. sec. 229, and cases cited; *Edsall v. Brooks*, 17 Abb. Pr. 227; 26 How. Pr. 426.

CHAPTER VI.

DISABILITIES OF ATTORNEYS BY REASON OF THEIR PROFESSION.

§ 118. Disabilities of attorneys.

§ 119. Restrictions as to becoming bail or surety.

§ 120. As to appearing for both parties, or on opposite sides.

§ 121. As to purchasing choses in action or demands for suit.

§ 122. As to acting in other capacities.

§ 123. As to acting for unqualified persons, and permitting others to use their names.

§ 124. When counsel in a cause may be a witness.

§ 125. Competency as a witness generally.

§ 126. Opinions as an expert on matters connected with his specialty.

§ 118. Disabilities of attorneys.—Among the restrictions placed upon the attorney, by reason of his profession and as an officer of the court, are the prohibitions against becoming security, appearing for both parties, or upon opposite sides, purchasing choses in action, acting in other capacities, acting for unqualified persons, permitting others to use his name, and, under some circumstances, from acting as a witness.

§ 119. Becoming bail or surety.—From motives of public policy, and to prevent attorneys having an undue personal interest in litigation, they are usually prevented, either by statute, or by rule of court, or on general principles, from becoming bail or surety in causes in which they are engaged, or even in any causes in the courts of which they are attorneys. If they become so, in violation of whatever provisions exist in that regard, they are liable to be considered as having placed themselves in contempt of court, and may be so dealt with.¹

It has been the general rule in England, since 1654, that attor-

¹ *Love v. Sheffelin*, 7 Fla. 40; *Gilbank v. Stephenson*, 30 Wis. 155; *Massie v. Mann*, 17 Iowa, 131. See *Hoffman v. Rowley*, 13 Abb. Pr. 398; *Branger v. But-terick*, 30 Wis. 153; *Dillon v. Watkins*, 2 Spear, 445; *Ryckman v. Coleman*, 13 Abb. Pr. 398; *Miles v. Clarke*, 4 Bosw. 632. In some States, however, the rule has not obtained. See *Abbott v. Zeigler*, 9 Ind. 511; *Walker v. Holmes*, 22 Wend. 614; *Church v. Drummond*, 7 Ind. 17.

neys cannot become bail, and this rule, with some variations, has been extensively adopted in America.¹ One other reason of the rule is that if an attorney was allowed to become bail for a client, in causes in which he was engaged, he would be subject to importunities with which he would perhaps be in a measure constrained to comply, though he might deem it imprudent to do so. The rule has been considered applicable to every case in which a party in the prosecution or defense of a suit is required to give bail or security of any kind,² but still he is sometimes allowed by statute to become security for costs.³

The disqualification of an attorney as to bail is not usually confined to cases in which he is attorney, but is general in its operation;⁴ but still he must be a practicing attorney, and so where he had not practiced for six years he was considered competent.⁵ The bail, however, cannot be treated as a nullity, and an attorney, if he signs, is liable on his recognizance, notwithstanding the prohibition, though an infringement of the rule may subject him to penalties.⁶ The rule extends to the attorney's clerks, even though the clerk be not in the service of the party's attorney.⁷ But there appears to be no objection to an attorney's clerk becoming bail for his employer,⁸ although a conveyancer engaged in partnership with an attorney, and sharing in the general profits of the business of the office, though not practicing himself, was not allowed to justify as bail.⁹

For the same general reason on which the rule is founded, and to prevent evasions of it, it has been decided that bail who have been indemnified by an attorney are not competent, whether the indemnity be in writing or not.¹⁰ But if one becomes bail merely

¹ *Mann v. Nottage*, 1 Younge & J. 367*n*; *Coster v. Watson*, 15 Johns. 535.

² *Craig v. Scott*, 1 Wend. 35.

³ *Walker v. Holmes*, 22 Wend. 614.

⁴ *Anon.* 1 Chit. 714*n*.

⁵ *King v. Sheriff*, 2 East, 182; *Bell v. Gate*, 1 Taunt. 162.

⁶ *Ibid.*; *Foxall v. Bowerman*, 2 East, 182; *Bauter v. Levi*, 1 Chitt. 713; *Harper v. Tahomden*, 1 Chit. 714.

⁷ *Anon.* Lofft, 263, 280; *Boulogne v. Vautrin*, Cowp. 828; S. C. 2 Doug. 467*n*; *Thompson v. Roubell*, 2 Doug. 467*n*; *Laing v. Candale*, 1 H. Black. 76; *Cornish v. Ross*, 2 H. Black. 350; *Stoneham v. Pink*, 3 Price, 263; *Fenton v. Ruggles*, 1 Bos. & P. 356; *Redit v. Broomhead*, 2 Bos. & P. 564.

⁸ *Dixon v. Edwards*, 2 Anstr. 356.

⁹ ——— *v. Yates*, 1 Dowl. & R. 9.

¹⁰ *Greensil v. Hopley*, 1 Bos. & P. 103; *Capon v. Dillamore*, 1 Bing. 423; S. C. 8 Moore, 516; *Anon.* 1 Dowl. O. S. 1.

at the request of an attorney, not being indemnified by him, nor expecting to be, he is of course competent.¹

The rule as to bail in courts of law was never adopted in the courts of chancery in respect to security required by statute, and it has been held that a solicitor might be surety upon a bond for costs, and the disability limited to bail for the appearance of the party arrested.²

§ 120. Acting on both sides.—Even by the consent of parties, an attorney is not permitted to act on both sides of a cause. Attorneys in England have, in pursuance of the summary jurisdiction of the court, been committed to the Fleet and their names stricken from the rolls for accepting a retainer on both sides.³ In other cases, the court has, on motion, set aside proceedings, and imposed the costs upon the attorney.⁴

“An attorney,” said Chief Justice Hobart, “oweth to his client fidelity, secrecy, diligence, and skill, and cannot take a reward on the other side.”⁵ Where an attorney has been retained by one, he cannot recover for professional services rendered in the same matter to another who is antagonistic, nor can he enforce a contract based on such assistance to an opposite party.⁶

Where it was shown that an attorney who was preparing to assist in the prosecution had been employed by the defendant in a criminal cause to make his defense, and that the latter had disclosed to such attorney the facts in the cause and the evidence for his defense, the attorney was very properly not allowed to assist in the prosecution, the court observing that to

¹ *Hunt v. Blaquiere*, 4 Bing. 588. See, also, upon the general subject, *Bell v. Gate*, 1 Taunt. 162; *Cakish v. Ross*, *Ibid.* 164*n*; *Hill v. Thompson*, 7 Moore, 403; *Jackson v. Trinder*, 2 W. Black. 1180.

² *Willmont v. Meserole*, 48 How. Pr. 430; *Jones v. Savage*, 10 Wend. 621; *Sigourney v. Waddle*, 9 Paige, 381; *Walker v. Holmes*, 22 Wend. 614; *Micklethwaite v. Rhodes*, 4 Sand. Ch. 434; *Ryckman v. Coleman*, 13 Abb. Pr. 598.

³ *Anon.* 7 Mod. 47; 2 Bing. 423; *Mason's Case*, 1 Freem. 74.

⁴ *Berry v. Jenkins*, 3 Bing. 423. As an attorney cannot act on both sides professionally, if he has been employed by a wife to procure a separation from her husband, he cannot engage to act for the husband as his attorney in preventing it. (*Herrick v. Cotley*, 30 How. Pr. 208; S. C. 1 Daly, 512.)

⁵ *Herrick v. Cotley*, 30 How. Pr. 208; S. C. 1 Daly, 512; *Yardley v. Ellill*, Hob. 8; *Shire v. King*, Yel. 32.

⁶ *Herrick v. Cotley*, 30 How. Pr. 208; 1 Daly, 512.

sanction such a course would be to defeat the very purpose for which courts were organized, viz., the administration of justice.¹ In another case the court found it necessary to remark that an attorney is never allowed to change sides in the same suit, though at different trials, or receive fees of two adversaries in one cause; but where an attorney has, in the course of other business, obtained a knowledge of matters connected with the suit in question, courts will not in general on that account restrain an attorney from acting against the party through whose business he obtained such knowledge.² But a counsellor appointed to perform the duties of prosecuting officer in the latter's absence cannot act as such in a criminal cause depending upon the same state of facts as a civil action in which he has been previously employed, and if he is allowed to so conduct the prosecution in the face of the defendant's objection, it is error.³

§ 121. Buying demands for suit.—To prevent undue personal interest, and in restraint of unnecessary litigation, attorneys are not generally at liberty to buy demands for suit or choses in action. A further object of the restriction was originally to prevent attorneys from purchasing debts or other things in action for the purpose of obtaining costs by prosecuting them. The rule, however, is not intended to prevent a purchase for the honest purpose of protecting some other important right of the assignee.⁴ In some States, it has even been made a criminal offense for an attorney to buy any chose in action for the purpose of bringing suit thereon. The rule applies to equitable suits as well as to suits at law.⁵ It extends to purchases made at judicial sales under the direction of an officer of the court.⁶

Wherever the restriction has been incorporated into the statu-

¹ *Wilson v. State*, 16 Ind. 392; *Gaulden v. Georgia*, 11 Ga. 47.

² *Price v. Company*, 18 Ind. 137; *Henry v. Raiman*, 25 Pa. 354; *Valentine v. Stewart*, 15 Cal. 387; *Sherwood v. Saratoga R. R. Co.* 15 Barb. 650.

³ *Commonwealth v. Gibbs*, 4 Gray. 146.

⁴ *Baldwin v. Latson*, 2 Barb. Ch. 306; *Van Rensselaer v. Sheriff*, 1 Cowen, 443; *Hall v. Bartlett*, 9 Barb. 297; *Brotherson v. Consalus*, 26 How. Pr. 213; *Warren v. Paine*, 3 Barb. Ch. 213; *Mann v. Fairchild*, 3 Abb. N. Y. App. 152; 14 Barb. 548, overruling *S. C.* 5 Barb. 108; *Ramsey v. Erie R. R. Co.* 8 Abb. Pr. 174.

⁵ Cases cited *supra*.

⁶ *Mann v. Fairchild*, *supra*. See, as to prosecuting in justices' courts, *Goodell v. People*, 5 Parker Cr. C. 206.

tory law, such statutes have usually been declared constitutional, and even in criminal cases courts have gone so far as to hold that the intent with which the attorney buys the note or thing in action need not be alleged in the indictment, nor need it be averred that a prosecution has been commenced on it. The act of buying constitutes the offense; and on this being shown, it lies with the defendant to make out that he is within any exception or proviso in the statute.¹ The date, amount, time when due, etc., with other circumstances going to the question of intent, have been held immaterial² to be alleged.

While the relation of attorney and client continues, the court will carefully scrutinize the dealings and contracts between them, and guard the client's rights against every attempt by the attorney to secure an advantage to himself at the expense of the client. Nor is it necessary in such case for the client to show actual, or, as it is sometimes called, active fraud, in order to obtain relief; but the law will presume in his favor so soon as the confidential relation is shown to have existed at the time of the transaction complained of. This rule has its foundation on principles of public policy, and is adhered to by the courts with severity.

If the attorney purchases the subject-matter in litigation from his client's adversary in the suit, or any interest therein, his client will be entitled to the advantages growing out of the purchase at his election. The attorney will be held to be the agent of his client for the purpose of effecting the purchase, if the client chooses to hold him to that position.

An attorney will not be permitted to buy and hold for himself against his former client a right, claim, or demand, as to which he had been the adviser of the latter; for it will be presumed that he acquired information in regard to it, under the confidence of his former relation, or in the exercise of his duty as attorney and counsel. In such case, an obligation remains to

¹ In some States, this disability does not exist.

Purchase of an interest in property by an attorney, made after judgment has been obtained, is not forbidden by the laws of Louisiana; and where money is borrowed to make the purchase, the lender of the money is estopped from pleading illegality in the purchase, and thus retaining the property which had been conveyed to himself as security for the loan. (*McMicken v. Perrin*, 18 How. 507.)

² *People v. Walbridge*, 3 Wend. 120; 6 Cowen, 512. But see *Hall v. Bartlett*, 9 Barb. 297.

be faithful to the trust reposed in him, notwithstanding his employment may have terminated; and it is not in his power to relieve himself of a disability which he voluntarily assumed, and which became permanent as soon as it attached. It is not an answer to say that the demand was already fixed and determined as a legal obligation, that the claim was open alike to all purchasers, and that the party is not injured in being compelled to pay a just and legal debt. But a principle of public policy and natural equity intervenes, and denounces the act as unfair, because accomplished under circumstances of temptation which might lead to violations of just obligations and duties. The doctrine is founded in a desire of the law to apply the principle of preventive justice, so as to shut out the inducement to perpetrate a wrong, and by disarming parties of all legal sanction and protection for their acts, to suppress the temptation.¹

An attorney, it seems, has a right to make a purchase of judgments for the purpose of issuing executions and collecting the debts, notwithstanding a statute prohibiting attorneys from buying choses in action, with the intent and for the purpose of bringing suits thereon. The policy of the law does not embrace such a case.² The defense is as effectual in equity as in actions at law. It is held that the disability continues as long as the reason for it exists.³

Advances, however, made by an attorney to his client from motives of humanity, after the commencement of the suit, are not a violation of the rule, when made in consideration of a security for the payment of money being left with an attorney for collection.⁴ An agreement to have one-third of the demand when collected as compensation, is not within the prohibition.⁵

Whenever a defendant sets up the defense that the demand on which the action is founded has been bought and sold, or received for prosecution by an attorney, contrary to the statute or the policy of the law, it is a question for the court, and not

¹ *Brotherson v. Consalus*, 26 How. Pr. 213.

² *Ibid.*; *Warren v. Paine*, 3 Barb. Ch. 630.

³ *Brotherson v. Consalus*, 26 How. Pr. 213; *Warren v. Paine*, 3 Barb. Ch. 630; *Henry v. Raiman*, 25 Pa. 354; 8 Clark & F. 657; *Galbraith v. Elder*, 8 Watts, 81.

⁴ *Bristol v. Dann*, 12 Wend. 142.

⁵ *Hall v. Gird*, 7 Hill, 586.

the jury. If determined against the plaintiff, he must be nonsuited; if in his favor, the jury must be instructed accordingly.¹

§ 122. Acting in other capacities.—In all legal proceedings, and at every stage of a cause, a court scrupulously guards against intrusting the execution of its mandates to persons having any interest in the cause. The law will not tempt those having an interest in any way to abuse its process for the purpose of promoting selfish ends. So a solicitor in a cause has been held disabled from acting as a special master, to execute a decree in the cause;² nor can an attorney make a writ and indorse his name upon it as attorney for the plaintiff, and also sign it as justice of the peace.³

§ 123. Acting for unqualified persons—Permitting others to use name of attorney.—In England, by 6 and 7 Vict., chap. 73,⁴ if any attorney or solicitor willfully and knowingly acts as agent in any action or suit in any court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as such, or permits his name to be made use of in such action upon the account or for the profit of any unqualified person, or sends any process to such unqualified person, or does any other act thereby to enable such unqualified person to appear, act, or practice, in any respect, as an attorney or solicitor in any suit at law or in equity, knowing such person not to be qualified, and complaint be made in a summary way to any of the superior courts wherein the attorney is admitted, and proof is made upon oath to the satisfaction of the court that the attorney has so willfully and knowingly offended, he is to be stricken from

¹ *Orcutt v. Pettit*, 4 Den. 233; *Roe v. Jerome*, 18 Conn. 138; *McFadon's Executor v. Martin*, 3 Har. & McH. 153. See *Mann v. Fairchild*, 3 Abb. N. Y. App. 152; *Brotherson v. Consalus*, 26 How. Pr. 213; *Van Rensselaer v. Sheriff*, 1 Cowen. 443; *Baldwin v. Latson*, 2 Barb. Ch. 306.

² *White v. Haffaker*, 27 Ill. 349. See *Taylor v. Bank*, 14 Ala. 633; *Spinks v. Davis*, 32 Miss. 152.

³ *Ingraham v. Leland*, 19 Vt. 304.

⁴ The repealed sec. 11 of 22 Geo. II, chap. 46, was of similar import. See, also, 2 Geo. II, chap. 23, sec. 17; *Tidd's Pr.* 74; *In re Jackson*, 1 Barn. & C. 270; *Tench v. Roberts*, 6 Madd. 145; *In re Clarke*, 3 Dowl. & R. 260; *In re Isaacson*, *Clarke & Brookes*, 8 Moore, 214-322; *Ex parte Watton*, 5 Barn. & Ald. 824. See, also, *In re Garbutt*, 9 Moore 157; 2 Bing. 74; *In re Jacques*, 2 Dowl. & R. 64; *Williams v. Jones*, 5 Barn. & C. 108.

the roll and forever after disabled from practicing, and the court may also commit the unqualified person to prison without bail for any term not exceeding one year, and by the 23 and 24 Vict., chap. 127, sec. 26, a person who acts as attorney contrary to the above statute, or who in his name, or in the name of any other person, in any wise acts as a proctor in or with respect to any proceeding in the court of probate, or in the court of divorce and matrimonial causes, without being duly qualified so to act, will be deemed guilty of a contempt of court and incapable of maintaining any action or suit for fees or disbursements, and in addition to other penalties and forfeitures to which he may be subject, he forfeits the sum of £50, recoverable by action to be brought with the sanction of the attorney-general in the name of the incorporated law society.

The mischief against which these statutes are aimed is the practice of acting as an attorney or solicitor without being duly qualified, and the offense prohibited is not the mere permitting the name to be made use of "upon the account or for the profit of an unqualified person," but doing it in such a manner as thereby to enable such unqualified person to appear, act, or practice in any suit at law or in equity.¹ An attorney, however, admitted in one of the superior courts according to the 6 and 7 Vict., chap. 73, may practice in any other court in the name of an attorney of the latter.² In many of the United States of America, statutes of similar import exist, with more or less severe penalties.

§ 124. When counsel in a case may be witnesses.—"It has been doubted," says Wharton, in his recent admirable work on the law of evidence in civil issues, "whether a lawyer, who in any capacity has addressed a jury in a cause, may be permitted to testify in the same cause as a witness;³ though, as this might, in extraordinary cases, work injustice, the exclusion should be confined to those instances in which the attempt is

¹ *Scott v. Miller*, Johns. 220; 5 Jur. N. S. 858; 28 L. J. Ch. 584.

² *Hulls v. Lee*, 11 Jur. 891; 10 Q. B. 940.

³ Wharton on Evidence, sec. 420; *Stones v. Byron*, 9 Dowl. & L. 393; *Deane v. Packwood*, Ibid. 395; *Carrington v. Holabird*, 17 Conn. 530; *Quarles v. Waldron*, 20 Ala. 217.

recklessly and unnecessarily to unite the functions of counsel and witness.¹ The mere fact that the case has been opened by an attorney who has previously cross-examined witnesses on the other side, does not make him incompetent as a witness for his client.² Where, however, counsel thus become witnesses, it may be a proper exercise of the discretion of the court to prohibit them from subsequently addressing the jury on the case thus made up; and the testifying of the counsel should be confined to extreme cases, as to which there is no other proof.³ But, as a general rule, a lawyer is a competent witness in a case he is trying or directing."⁴

In *Follansbee v. Walker*, 72 Pa. 230, Read, C. J., said: "On the trial of this cause, A. S. Foster, Esq., was offered as a witness on the part of the defense, objected to by the plaintiff's counsel, and rejected by the lower court for the following reason: 'Mr. Foster, as attorney for the defendant Follansbee, opened the case for him to the jury and examined the witnesses for said defendant, and the court on this ground excludes him as a witness.' This is assigned for error.

"In *Frear v. Drinker*, 8 Barr. 521, Mr. Justice Rogers says: 'It is also contended an attorney is not a competent witness for his client. In England, it has been lately ruled that an attorney is not to give evidence under certain circumstances.' He cites two cases before Mr. Justice Patterson and Mr. Justice Erle, and he says: 'The furthest the court has yet gone is to discourage the practice of acting in the double capacity of attorney and witness, but there is nothing to prohibit an attorney from being a witness for his client, when he does not address the jury. It is said, and I agree, that it is a highly indecent practice for an attorney to cross-examine witnesses, address the

¹ *State v. Cook*, 23 La. An. 347; *Tilton v. Beecher*, Pamph. Rep.

² *Follansbee v. Walker*, 72 Pa. 228.

³ *Cobbett v. Hudson*, 1 El. & B. 11; *Ross v. De Moss*, 45 Ill. 447; *Madden v. Farmer*, 7 La. An. 580; *Boissy v. Lacon*, 10 Ibid. 29. Under Georgia statute excluding attorneys from testifying for their clients, see *Churchill v. Corker*, 25 Ga. 479.

⁴ *Potter v. Ware*, 1 Cush. 519; *Tullock v. Cunningham*, 1 Cowen, 256; *Folly v. Smith*, 7 Halst. 139; *Bell v. Bell*, 12 Pa. 235; *Follansbee v. Walker*, 72 Pa. 230; *Morgan v. Roberts*, 38 Ill. 65; *Abbott v. Striblen*, 6 Iowa, 197; *State v. Woodside*, 9 Ired. 496; *Morrow v. Parkman*, 14 Ala. 769; *Grant's Succession*, 14 La. An. 795.

jury, and give evidence himself to contradict the witnesses. It is a practice which, as far as possible, should be discountenanced by courts and counsel. But these cases are not open to this objection, because it appears, negatively, that the counsel did not address the jury.'

"It is sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client. In the earlier cases in Pennsylvania, the objection to the examination of the attorney in the cause was his interest in it, as in the case of *Miles v. O'Hara*, 1 Serg. & R. 32, in 1814. In the first case, (*Newman v. Bradley*, 1 Dallas, 240, in the year 1788) Howell, who was of counsel for the plaintiff, gave the chief evidence to support the action, and he and Tod argued the cause before the jury, and there was a verdict for the plaintiff. When Howell offered himself as a witness, Levi objected that he was interested, inasmuch as his judgment fee depended on his success in the cause. But the objection was overruled by the court. The two English cases cited by Judge Rogers have since been overruled. Pitt Taylor, in the second volume of his *Treatise on the Law of Evidence*, p. 1170, sec. 1240, 4th ed., thus states the law: 'The judges at *nisi prius* were at one time inclined to regard as incompetent to testify all persons, whether counsel, attorneys, or parties, who, being engaged in a cause, had actually addressed the jury on behalf of that side upon which they were afterward called to give evidence. Further investigation of the subject, however, has led to a judicial acknowledgment that no such practice exists.' The authority for this, *Corbett v. Hudson*, 22 Law J. Q. B. 11, 1852, the judgment of the court, of which Mr. Justice Erle was one, being delivered by Lord Campbell, C. J.

"The question may, therefore, be considered as settled in England and Pennsylvania, and also in Massachusetts. (*Potter v. Inhabitants of Ware*, 1 Cush. 519.) There was, therefore, error in holding Mr. Foster was not a competent witness."¹

¹ *Follansbee v. Walker*, 72 Penn. 230, per Read, C. J. Wharton on Evidence, sec. 420, note 5. By the Roman law, no attorney is permitted to testify as to a matter in which he is professionally employed, and this prohibition includes all confidential professional agents. (Ibid.) See L. 25, D. 22, 5; Heffter, Civil Procedure, 205.

The attorney is not disqualified from being a witness, even though his judgment fee depends upon his success, or if he expects a larger fee if his client succeeds.¹

§ 125. Competency as a witness generally.—Even where the rule was that a person or a party was excluded as a witness on the ground of interest, an attorney having no contingent interest or share in the result of the suit was almost invariably permitted to testify in favor of his client. When such testimony was relevant to the issue, his mere professional interest in the result of the suit was not sufficient to prevent him from testifying.² The subject of testimony against the client, or without his consent, will fall under the head of “privileged communications,” and will form the subject of a separate chapter, when we come to speak of the relation of attorney and client.

§ 126. Opinions as an expert.—A lawyer may give opinions as an expert on matters connected with his specialty. Lawyers are admissible as witnesses to prove the laws of their profession. On the question of fees, for instance, a lawyer is competent to prove the value of the services sued for,³ and also to prove the practice of courts.⁴

¹ *Little v. McKeon*, 1 Sand. 607; *Robinson v. Danchy*, 3 Barb. 20; *Frear v. Drinker*, 8 Pa. 520; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Newman v. Bradley*, 1 Dall. 241; *Boulden v. Hebel*, 17 Serg. & R. 312; *Miles v. O'Hara*, 1 Serg. & R. 32; *Slocum v. Newby*, 1 Murph. 423. See, as to practice of attorneys testifying or making affidavit for his client being objectionable, *Little v. McKeon*, 1 Sand. 607; *Spencer v. Kinnard*, 12 Tex. 180; *Stratton v. Henderson*, 26 Ill. 68.

² *Potter v. Inhabitants of Ware*, 1 Cush. 519; *Jones v. Bolton*, 12 Pa. 339; *Baker v. Arnold*, 1 Cart. 258; *Linton v. Commonwealth*, 46 Pa. 294; and numerous other early cases, which it would subserve no useful purpose to cite, even the restriction on the ground of interest having been very generally removed by statute.

³ *Wharton on Evidence*, sec. 442; *Covey v. Campbell*, 52 Ind. 157; *Allis v. Day*, 14 Minn. 516; *Ottowa v. Parkinson*, 14 Kan. 159.

⁴ *Ibid.*; *Mowry v. Chase*, 100 Mass. 79.

CHAPTER VII.

ATTORNEY'S LIABILITY TO THIRD PARTIES.

- § 127. General liability to third persons.
- § 128. Liability for fees and costs.
- § 129. Liability for indorsement of the writ.
- § 130. Liability on undertakings.
- § 131. For excess of authority.
- § 132. In cases of malpractice.
- § 133. Liability for acts done—Malicious prosecution by attorney.
- § 134. Joint liability of attorney and client.
- § 135. Liability of third persons to attorneys.
 - § 136. As for slander of attorneys.
 - § 137. Expressions held slanderous.
 - § 138. Expressions held not slanderous.
 - § 139. Other expressions.
 - § 140. The evidence.

§ 127. General liability to third persons.—Ordinarily, attorneys at law, like other agents, are exempt from liability to third parties for what they do in the name and on behalf of their principals; but, like other agents, they may render themselves personally liable to third parties in various ways, as by acting without authority, or independently of their clients, or in excess of authority, practicing fraud or collusion, or acting under illegal, informal, or irregular proceedings—and the same rules appear to apply in cases both of contracts and of torts. They may be liable for entering an unauthorized appearance, and for assuming obligations on their own account.¹ In cases of contract, “the attorney,” says Lord Abinger,² “is known merely as the agent—the attorney of the principal—and is directed by the principal himself. The agent, acting for and on the part of the

¹ Co. Litt. 52a; Wharton on Agency, secs. 612, 613; Bell v. Mason, 10 Vt. 509; Resspass v. Morton, Hardin, 226; Hazelrigg v. Brenton, 2 Duval, 525; Ford v. Williams, 13 N. Y. 597; Jones v. Wolcott, 2 Allen, 247; Coit v. Sheldon, 1 Tyler, 304; Smith v. Bowditch, 7 Pick. 138; Munnikuyson v. Dorsett, 2 Har. & G. 374; Jenkins v. Fereday, Law R. 7 Com. P. 358; Field v. Gibbs, Peters C. C. 155; Johnson v. Ogilby, 3 P. Wms. 277.

² Robins v. Bridge, 3 Mees. & W. 119.

principal, does not bind himself, unless he offers to do so by express words; he does not make himself liable for anything, unless it is for those charges which he is himself bound to pay, and for which he makes a charge."

Lord Erskine states the law to the same effect:¹ "No rule of law is better ascertained, or stands upon a stronger foundation, than this—that where an agent names his principal, the principal is responsible, not the agent; but for the application of that rule, the agent must name his principal as the person to be responsible."

Although attorneys may be liable for work bestowed on their clients' affairs, at their own express request, in diminution of the labor properly devolving upon themselves, still they are not generally liable for labor performed merely for their clients' advantage, and not their own, even though at their own express request. An attorney, for instance, is not personally liable to a witness, whom he subpœnas to give evidence in a cause, for his expenses of attendance,² nor for his hotel bill while in attendance on the trial;³ and it has even been held that an express promise by the attorney after the trial, to pay a witness a compensation for his loss of time, cannot be enforced either by action or a summary application to the court.⁴ Nor is the attorney liable to the sheriff for his fees on an execution issued in the regular course of an action, in the absence of any special circumstances showing that he had made himself personally liable.⁵

A person injured by an attorney appearing for him without authority has a remedy by action against the attorney,⁶ and an action will lie against an attorney for maliciously suing out process, and the attorney and his client may both be liable, as for illegally issuing a *f. fa.*⁷

But an attorney is not liable, civilly, for ordering a levy on

¹ *Ex parte Hartop*, 12 Ves. 352.

² *Robinson v. Bridge*, 3 Mees. & W. 114; 6 Dowl. 140; *Sargeant v. Pettibone*, 1 Aiken, 355.

³ *Fendall v. Nokes*, 7 Scott, 647.

⁴ *Bates v. Sturges*, 6 Moore & S. 172.

⁵ *Mayberry v. Mansfield*, 16 Law J. Q. B. 102; *Benson v. Whitfield*, 4 McCord, 149.

⁶ *Smith v. Bowditch*, 7 Pick. 138; *Coit v. Sheldon*, 1 Tyler, 304; *Munnikuyson v. Dorsett*, 2 Har. & G. 374.

⁷ *Burnap v. Marsh*, 13 Ill. 535; *Newberry v. Lee*, 3 Hill, 523.

property, if he acts in good faith and on reasonable cause.¹ To sustain an action against an attorney for acts done in the prosecution of his client's rights, it must be shown that such acts were malicious, and without foundation.² Where an attorney procures money to be advanced by a third person, in the prosecution of an action, without attempting to pledge the credit of his client therefor, the attorney alone is responsible to such third person.³ An attorney may also incur liability for costs.

An attorney may be summarily compelled to perform a personal undertaking, given by him in the course of an action; and in the course of other transactions, an attorney may render himself liable to an action on an express undertaking or agreement in his own name, as to give up documents, to pay the costs on the compromise of a prosecution, and to pay the extra expenses in a proceeding incurred at his express request.⁴ Some of the liabilities above mentioned will now be more specifically touched upon.

§ 128. Attorney's liability for costs and fees.—The general rule is, that where either of the parties in a suit is made liable to the payment of costs, or has actually paid them, through the gross negligence, ignorance, or misbehavior of his attorney, the court will, on motion, order the attorney in the former case to pay the costs instead of his client, and in the latter to reimburse him.⁵ An attorney is liable to pay the costs of sham pleas, though instructed by his client so to plead.⁶ But the court will not require the attorney to disclose the authority by which he pleads a sham plea.⁷ An attorney may, on retainer

¹ *Hunt v. Printup*, 28 Ga. 297. See *Seaton v. Cordray*, Wright, 102; *Ford v. Williams*, 24 N. Y. 359; 13 N. Y. 577.

² *Wigg v. Simonton*, 12 Rich. 583.

³ *Bell v. Mason*, 10 Vt. 509.

⁴ *Foster v. Blakelock*, 5 Barn. & C. 228; 8 D. & R. 48; *Kendry v. Hodgson*, 5 Esp. 228; *Watson v. Murrell*, 1 Car. & P. 307; *Hall v. Ashurst*, 1 Car. & M. 714; 3 Tyrw. 420. See *Iveson v. Corington*, 1 Barn. & C. 160; *Burrell v. Jones*, 3 Barn. & Ald. 47.

⁵ *Neglecting to appear*.—If a solicitor for the plaintiff undertakes, though voluntarily, to appear at a hearing, and afterward fails or refuses to appear, the court may order him to pay the costs *occasioned* by his default. (16 Ves. 163; 17 Ibid. 130; 5 Madd. 21; *Grinstead v. Grinstead*, 1 Turn. & Ven. P. Ch. 308.)

⁶ *Vincent v. Groome*, 1 Chit. 182. See *Johnston v. Alston*, 1 Camp. 176.

⁷ *Merrington v. A'Beckett*, 1 Dowl. & R. 231; 2 Barn. & C. 81.

of his client, sue for a debt which he knows to be released, because he does it only as servant to another in the way of his profession.¹ An attorney, guilty of many gross blunders, has been ordered to pay money on both sides.² An attorney having undertaken to pay costs on a stay of proceedings, was held bound to do so, although his client died before the time for putting in bail had arrived.³ Where one is made lessor in ejectment without his authority, the plaintiff's attorney, and not he, is liable for the costs.⁴ And the costs of an irregularity arising from the gross ignorance or negligence of the attorney will be charged, sometimes, upon him personally.⁵

An attorney has been held liable to the sheriff for fees on process delivered to him for execution.⁶ But he is not liable for the fees of a witness summoned to testify for his client, unless upon a special promise to pay them. Under a Federal statute, if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States, or of the Territories thereof, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required, by order of court, to satisfy any excess of costs so incurred.⁷

A solicitor is personally liable for the costs of correcting an irregular proceeding occasioned by his negligence or gross ignorance, which is prejudicial to the rights of the adverse party; and if the costs are charged upon the client in the first instance, he may recover them in an action against the solicitor.⁸

So a counsel who signs a scandalous or impertinent pleading is personally liable for the costs of proceedings to expunge the scandalous or impertinent matter, or have it stricken out; and an unsuccessful attempt to collect such costs from the party for

¹ *Anon.* 1 Mod. 209.

² *White v. Washington*, 1 Barnes, 302; 2 *Ibid.* 4; *Glynn v. Kirby*, 1 Strange, 402; *Prac. Ca. K. B.* 37. See 6 Mod. 106*n*.

³ *Hillings v. Jones*, 3 Bing. 70. See *Ex parte Hughes*, 5 Barn. & Ald. 482.

⁴ *People v. Bradt*, 6 Johns. 318.

⁵ *Kane v. Van Vrankin*, 5 Paige, 62; *Ex parte Robbins*, 63 N. C. 309. See *Cushman v. Brown*, 6 Paige, 539; *Powell v. Kane*, 5 Paige, 260; 2 *Edw.* 450.

⁶ *Birkbeck v. Stafford*, 23 How. 236; *S. C.* 14 Abb. 285; *Towle v. Hatch*, 43 N. H. 270; *Sargeant v. Pettibone*, 1 Aiken, 355.

⁷ Act of July 22nd, 1813, sec. 3; 3 *Stats.* at L. 21.

⁸ *Kane v. Van Vrankin*, 5 Paige, 62.

whom such pleading was put in, will not discharge the counsel from liability. Nor will the fact that the counsel signed the paper without fee or reward, and merely as the friend of another party, and at his request, and without reading the same, furnish any answer. One principal object in requiring the signature of counsel to a bill or answer is that the court may have the security of a counsellor's certificate that the pleading is not scandalous or impertinent. And it is improper for a counsellor to put his official signature to a pleading which he has never read, and with the contents of which he is ignorant. If he puts his signature to an answer without reward, as a mere act of friendship for the solicitor, and the answer should contain scandalous or impertinent matter, so as to subject him to costs, or to the censure of the courts, he must look to the solicitor for his indemnity so far as pecuniary loss is concerned.¹

In some States, an attorney who institutes a suit for a non-resident is liable for costs in the event of the suit being dismissed, or his client cast; or if he recover, and judgment be entered up and execution issue, and there is a return thereon of no property, he is still liable for the costs.²

An attorney who brings an action in the name of another, and in which he is beneficially interested by virtue of an agreement by which he is to have a portion of the recovery as compensation for his services, is liable the same as the plaintiff for defendant's costs. It is not material that he was not interested in the entire amount of the demand involved in the action. It is sufficient to be interested in the recovery.³

The authorities upon the question of the liability of an attorney for fees and costs are by no means harmonious. On the

¹ *Cushman v. Brown*, 6 Paige, 539; *Powell v. Kane*, 2 Edw. Ch. 450; *McVey v. Cantrel*, 8 Hun, 522.

² *Carmichael v. Pendleton*, Dud. (Ga.) 173; *Ross v. Harvey*, 32 Ga. 388; *Wright v. Black*, 2 Wend. 258; *Jones v. Savage*, 10 Wend. 621; *Waring v. Barrett*, 2 Cowen, 460; *People v. Marsh*, 3 Cowen, 334; *Alexander v. Carpenter*, 3 Denio, 266. See *Jackson v. Powell*, 2 Johns. Cas. 67.

The institution of proceedings by one attorney, from improper motives and without just grounds, to disbar another, is misconduct for which the court has power to impose upon the moving attorney the costs and disbursements of the proceedings. (In re Kelly, 62 N. Y. 198; 59 Ibid. 595.)

³ *Voorhies v. McCartney*, 51 N. Y. 387; *Bliss v. Otis*, 1 Denio, 656; *Giles v. Halbert*, 12 N. Y. 32.

one hand, it is claimed as a well-settled rule of law that where one person contracts as the agent of another, and the fact of his agency is known to the person with whom he contracts, the principal alone and not the agent is responsible. This rule has been considered directly applicable to the case of attorney and client, and has been so applied in the State of New York;¹ and with this view attorneys have been held not liable for referees' fees. But, on the other hand, when writs of mesne or final process are committed to the sheriff for service, by the attorney who sues them out, it is said that a promise by such attorney to pay the fees will ordinarily be implied, unless repelled by proof; but not when the writs are not so delivered by him, although he may have indorsed them. This decision was placed on the ground of general usage in the State, and independent contract.²

So the liability has been held to extend to reasonable charges for the care of property, storage, etc., but only on reasonable notice by the officer to the attorney, as to the expenses incurred.³ And a solicitor for a party in whose behalf a witness is examined is personally liable to an examiner for fees in taking testimony for the benefit of the client, both for the fees of the direct and the cross-examination.⁴

§ 129. Indorsement of writ, liability for. — Attorneys have sometimes by statute been made liable for costs by reason of their indorsement of the writ, if the principal was out of the State or unable to pay for the costs arising to the defendant by his arrest, and charges of imprisonment, in case the plaintiff was nonsuited, or discontinued, or judgment went against him;⁵ and

¹ *Judson v. Gray*, 11 N. Y. 413, doubting *Adams v. Hopkins*, 5 Johns. 252; doubting *Trustees v. Cowen*, 5 Paige, 570. See, also, *Hartop v. Juckes*, 1 Maule & S. 709; *Robbins v. Bridge*, 3 Mees. & W. 114; *Mayberry v. Mansfield*, 9 Ad. & E. N. S. 58; *Sargent v. Petticone*, 1 Aiken, 155; *Wires v. Briggs*, 5 Vt. 101; *Maddox v. Cranch*, 4 Har. & McH. 343; *Morse v. Porter*, 13 Serg. & R. 100; *Preston v. Preston*, 1 Doug. 292; *Hornell v. Kinney*, 1 How Pr. 105.

² *Towle v. Hatch*, 43 N. H. 270.

³ *Birkbeck v. Stafford*, 23 How. Pr. 236; *Towle v. Hatch*, 43 N. H. 270; *Tarbell v. Dickinson*, 3 Cush. 346.

⁴ *Trustees v. Cowen*, 5 Paige, 510.

⁵ *Booker v. Stinchfield*, 47 Me. 340; *Chadwick v. Upton*, 3 Pick. 441; *Harkness v. Farley*, 11 Me. 491; *Fairbanks v. Townsend*, 8 Mass. 449; *Talbot v. Whiting*, 10 Ibid. 359; *Rowe v. Truitt*, 14 Me. 393; *Hartwell v. Hemmenway*, 7 Pick. 117; *Miner v. Smith*, 6 N. H. 219; *McGee v. Barber*, 14 Pick. 212.

an indorsement "A. B., by his attorney, C. D.," is sufficient to establish the liability. The intention was to give a remedy to the defendant, who was unjustly sued, against the attorney, as well as the plaintiff, unless the plaintiff himself should indorse the writ in his own proper person.¹

§ 130. Liability to actions on undertakings.—If an attorney undertake to do any act himself, on behalf of his client, or that his client shall perform it, unless it clearly appear, on the face of such contract or undertaking, that he did not intend to make himself personally liable, he will render himself liable to an action for its non-performance. Many persons will deal with attorneys and professional men, who will not deal with an unknown client. "It would be preventing," says Lord Tenterden, "much of the ordinary business of life, if we were to hold that a solicitor entering into such a contract as this [an undertaking to pay rent for a bankrupt tenant] did not make himself personally responsible. It is for him to consider the probable effect of such an instrument before he signs it."²

The same principle applies to undertakings by attorneys to pay to the adverse side the costs in an action when taxed.³ The undertaking, however, may be waived in various ways, and then the attorney cannot be called upon to perform it.⁴

The general rule is, that when an attorney signs a voluntary recognizance he cannot avoid judgment, even if there is a rule of court or a statute prohibiting him from becoming so bound. He cannot thus take advantage of his own wrong.⁵

Attorneys are also sometimes liable on implied undertakings. It is a common practice for one attorney to do business for another. The attorney who does the business usually gives credit to the person who employs him, and not to the client for whose benefit it is done. An attorney doing business for another at

¹ *Chapman v. Phillips*, 8 Pick. 24; *Robbins v. Hill*, 12 Pick. 569; *Clark v. Paine*, 11 Ibid. 66; *Davis v. McArthur*, 3 Greenl. 27; *How v. Codman*, 4 Ibid. 81; *Harnur v. Watson*, 8 Ibid. 286.

² *Burrill v. Jones*, 3 Barn. & Ald. 49; *Appleton v. Binks*, 5 East, 148.

³ *Iveson v. Conington*, 2 Dowl. & R. 307; 1 Barn. & C. 160; *Watson v. Murrill*, 1 Car. & P. 307.

⁴ *Miller v. James*, 8 Moore, 208.

⁵ *Sherman v. State*, 4 Kan. 570; *Wallace v. Scales*, 6 Ohio, 429; *Jack v. People*, 19 Ill. 58; *Hicks v. Chouteau*, 12 Mo. 342.

torney may therefore give credit to that person to whom it is given in the usual course of such business, viz., to the attorney, and not to the client; and where the jury finds—and it is the province of the jury to find upon the subject—that the credit was given to the defendant, the attorney, the law will, from the usage of the business, raise an implied contract on the part of the latter to pay. If an attorney in such a case intends not to be personally responsible, it becomes his duty to give express notice that the business is to be done upon the credit of the client.¹ In equity, it has been held that where an attorney for and on behalf of his client promises to pay money as the agent of his client, he is not personally liable if he had authority from his client; but he is, if he had no authority.²

§ 131. Excess of authority.—Attorneys are liable for clearly exceeding their authority when third parties are damaged by reason thereof. As we have already seen,³ attorneys may be summarily compelled to perform a personal undertaking given by them in the course of an action; and in the course of other transactions an attorney may fix his own liability to an action on an express undertaking, or contract in his own name;⁴ as, to give up documents, to pay the costs on a compromise of a prosecution, to pay the extra expenses in a proceeding incurred at his express request.⁵ If an attorney act without authority, or issues process having no legal foundation, he may be liable as a principal for any ensuing injury.

Since an attorney is liable for damages suffered, if it transpires that the proceedings which he takes are wholly without authority, he should be certain that his instructions, whether written or oral, are genuine and authentic.⁶ An attorney has

¹ *Serace v. Wittington*, 2 Barn. & C. 11.

² *Johnson v. Ogilby*, P. Wms. 277.

³ *Ante*, Chapter IV.

⁴ *Foster v. Blakelock*, 5 Barn. & C. 328; 8 Dowl. & R. 48; *Iveson v. Conington*, 1 Barn. & C. 160; *Burrell v. Jones*, 3 Barn. & Ald. 47.

⁵ *Kendry v. Hodgson*, 5 Esp. 228; *Watson v. Murrell*, 1 Car. & P. 307; *Hall v. Ashurst*, 1 Crompt. & M. 714; S. C. 3 Tyrw. 420.

⁶ *Hoskins v. Phillips*, 16 Law J. N. S. Q. B. 333; *Field v. Gibbs*, Pet. C. C. 155; *Smith v. Bowditch*, 7 Pick. 138; *Munnikuyson v. Dorsett*, 2 Har. & G. 374; *Coit v. Sheldon*, 1 Tyler, 304; *People v. Bradt*, 7 Johns. 539; *Smith v. Bossard*, 2 McCord, 406.

been held liable for acting, though *bona fide*, under a written authority, which turned out to have been forged by a stranger,¹ and so if he acts on behalf of a fictitious person, or an absconder.²

Under some circumstances, however, if an attorney acts *bona fide* under a general authority, a particular authority will be presumed. Thus, an attorney acting for a mortgagee, whose money he had himself invested, was held justified in taking proceedings to recover it, without any express authority for the purpose on discovering that the security was bad.³

The attorney is liable to one against whom process has issued by means of fraud or deceit on the attorney's part; and where the process is irregular or illegal, or executed against the wrong party, both the attorney and the client who put it in force may be liable in trespass, the latter because the act of the attorney is, in point of law, his own act, and the attorney, because he has acted under proceedings which he is presumed to know were absolutely void.⁴

The authorities seem to be in favor of the proposition that in such cases there is no distinction between the liability of the client and that of the attorney. It is not impossible that an attorney may be in the nature of an officer handing over a paper which may be afterward acted upon with no more concurrence than that of a postman who conveys a letter. When such is his conduct, the principle may protect him. But if he deliberately directs the execution of a bad warrant, he takes upon himself the chance of all consequences.⁵ And where an arrest is made

¹ Robson v. Eaton, 1 T. R. 62.

² Hoskins v. Phillips, *supra*; Glyn v. Kirby, 1 Str. 402; Anon. 6 Mod. 309.

³ Anderson v. Watson, 3 Car. & P. 214. If, after proceeding to judgment against one, an attorney issue execution against another of the same name—a stranger to the previous proceeding—he might be liable to the latter in an action of trespass; and so, where the sheriff has seized under a *fi. fa.* the goods of a stranger to the previous proceedings by directions of the attorney. (Rowles v. Senior, 8 Q. B. 677.)

⁴ Gibson v. Mudford, 1 Roll. Rep. 408; Child v. Dwight, 1 Dev. & B. Ch. 171; Barker v. Braham, 3 Wils. 368; 2 W. Black. 866; Codrington v. Lloyd, 8 Ad. & E. 449; 3 Nev. & P. 442; 1 W. W. & H. 358; Parsons v. Lloyd, 2 W. Black. 845; 3 Wils. 341; King v. Harrison, 15 East, 615; Loton v. Devereux, 3 Barn. & Ad. 343; Bates v. Pilling, 6 Barn. & C. 38; Jarman v. Hooper, 13 Law J. N. S. Com. P. 63; People v. Montgomery, 18 Wend. 633; 7 Paige, 615.

⁵ Green v. Elgie, 5 Q. B. 114; Braham v. Barker, 3 Wils. 368; Codrington v. Lloyd, 8 Ad. & E. 449; Carratt v. Morley, 1 Q. B. 18. See Loton v. Devereux, 3 Barn. & Ad. 343; Brown v. Feeter, 7 Wend. 301; Cook v. Wright, Ryan & M. 278.

under process which is afterward set aside for irregularity, but which is not void on its face, the attorney in the suit is liable in trespass, as well as the plaintiff; and if, in an action of trespass, he justifies under the process, it is a good replication that the process was irregularly sued out, and was afterward set aside by the court for irregularity.¹ But where the replication set forth that the process was set aside merely, without showing that it was so set aside for irregularity, it was held bad.² But where the process is irregular merely, and not void on its own face, the party should apply to the court and have it set aside before bringing his action; otherwise it cannot be maintained.³ In cases, however, where the process is set aside for irregularity, it is sometimes the practice, where the proceeding set aside appears to have been taken in good faith, and in consequence thereof an action will technically lie, to require the party moving to stipulate not to bring an action;⁴ or, if one be already brought, he will be required to discontinue it, without costs.⁵ But where there are circumstances of aggravation—as where an execution, set aside as irregular, is oppressively executed—this condition will not be imposed.⁶

§ 132. Liability in cases of malpractice.—An attorney is not only liable to actions against him by his client, but he has been held liable if any other person receive damage by his malpractice, even though he act under the retainer of his client. If he knows a case to be out of the jurisdiction of an inferior court, or goes beyond the bounds of his duty as attorney, he has been held guilty as a trespasser.⁷ So a joint action of trespass, *vi et armis*, for false imprisonment, is maintainable against an attorney and his client, for illegally suing out a *capias ad satis*—

¹ *Codrington v. Lloyd*, 8 Ad. & E. 449; 3 Nev. & P. 442; 2 London Jurist, 593.

² *Prentice v. Harrison*, 7 London Jurist, 580; 1 Dav. & M. 50; S. C. 4 Ad. & E. N. S. 852.

³ *Reynolds v. Corp*, 3 Caines, 267; *Griswold v. Sedgwick*, 6 Cowen, 462. See *Mackay v. Blackett*, 9 Paige, 437.

⁴ *Rob v. Moffat*, 3 Johns. Rep. 257.

⁵ *Chandler v. Brecknell*, 4 Cowen, 49.

⁶ *Rogers v. Chapman*, 7 Cowen, 475.

⁷ *Goodwin v. Gibbons*, 4 Burr. 2108; *Barker v. Braham*, 3 Wils. 368; *Bates v. Pilling*, 6 Barn. & C. 38; *Crozer v. Pilling*, 4 Barn. & C. 26; 6 Dowl. & R. 129; *Griswold v. Sedgwick*, 6 Cowen, 456.

faciendum, and causing a party to be imprisoned thereupon; and so, also, in cases of an improper issuance of an execution, where an attorney goes beyond his duties; as, for instance, if he wantonly issues an execution upon a judgment unduly obtained, when he knows the debt has been paid. Attorney and client, in such cases, have both been held to be trespassers.¹

But an attorney is not liable, unless it be clearly proven that he has gone beyond the strict line of his duty. Where the attorney is professionally bound to act as he does, he is not liable;² nor where he acts in pursuance of his calling; as, where he brings suit, knowing that there is a release; for the defendant may not plead it.³

§ 133. Liability for acts done—Malicious prosecution by attorney.—If an attorney maliciously procure an unauthorized order of attachment, operating injuriously upon the defendant's rights, he is liable, and so is his client.⁴ He is also liable for an unlawful and malicious arrest, upon a claim which he knows to be unfounded.⁵ But it has also been held that an action for a malicious prosecution will not lie against one attorney for suing another in an inferior court, or for suing on the retainer of a client, although he knew there was no cause of action.⁶ In Massachusetts, it is said that the better doctrine would appear to be that an action will not lie against an attorney for bringing a civil action, unless he commenced it without the plaintiff's authority, or unless there was a conspiracy between them to bring a groundless suit—the attorney knowing it to be groundless—and commenced without any expectation of maintaining it.⁷

But the doctrine obtaining in other localities is, that if an attorney who commenced a suit which is alleged to be malicious, knew that there was no cause of action, dishonestly and for some sinister view, for some purpose of his own, which the law con-

¹ Inst. 102; Lutw. 124.

² Sedley v. Sutherland, 3 Esp. 202; Smith v. Gainsford, 1 Rose, 148; Carrott v. Smallpage, 9 East, 330.

³ Anon. 1 Mod. 209.

⁴ Wood v. Wier, 5 B. Mon. 544.

⁵ Stockley v. Hornidge, 8 Car. & P. 16.

⁶ Anon. 1 Mod. 209, 210.

⁷ Bicknell v. Dorion, 16 Pick. 478.

siders malicious, caused a party to be arrested and imprisoned, he will be liable therefor. And if an attorney becomes the instrument for prosecuting and imprisoning a party against whom he knows his client has no just claim or cause of arrest, and that his client is actuated by illegal or malicious motives, he is legally liable to the injured party. It is not necessary to show a conspiracy between attorney and client. An attorney may so act under his general employment to enforce a legal claim, as to render himself alone liable for a malicious prosecution or arrest. In actions for maliciously suing out process it is enough to aver that he falsely and maliciously, without having any reasonable or probable cause for so doing, sued out the writ, and falsely and maliciously caused the party to be arrested under it.¹

An attorney who acts in good faith and in conformity with law is not personally liable to third persons for acts done in pursuance of his clients' directions.² For instance, an attorney is not liable for commencing legal proceedings on behalf of another on a groundless claim, nor for taking proceedings against the wrong party, if done by mistake, and without malice, nor for taking such proceedings as are erroneous, and without jurisdiction.³ No such action will lie unless the declaration charges the attorney with acting *maliciously*.⁴ Nor is an attorney responsible for an illegal arrest or levy under a regular writ, unless he has actual knowledge of the illegality.⁵

But in the case of malice, the rule is otherwise. So an attorney, who deliberately issues or enforces an irregular or void writ, is liable in trespass to the party injured, and fraud or deceit in issuing legal process may make him liable.⁶

¹ Burnap v. Marsh, 13 Ill. 535.

² Co. Litt. 52a; Johnson v. Ogilby, 3 P. Wms. 277; Wharton on Agency, sec. 611; Allaway v. Duncan, 16 L. T. N. S. 264; Wigg v. Simonton, 12 Rich. 583; Hunt v. Printup, 28 Ga. 297; Barker v. Braham, 2 W. Black. 867. See Ford v. Williams, 24 N. Y. 359.

³ Anon. 1 Mod. 209. See Davies v. Jenkins, 11 Mees. & W. 745; 1 Dowl. & L. 321; 12 Law J. N. S. Exch. 386; Carratt v. Morley, 1 Q. B. 18, 28; Burnap v. Marsh, 13 Ill. 535.

⁴ Ibid.; Lynch v. Commonwealth, 16 Serg. & R. 368.

⁵ Sowell v. Champion, 6 Ad. & E. 407; Saxon v. Castle, 6 Ibid. 652; Gibson v. Chaters, 2 Bos. & P. 129; Bryant v. Clutton, 1 Mees. & W. 408; Stokes v. White, 1 Crompt. M. & R. 223.

⁶ Gibson v. Mudford, 1 Roll. Rep. 408; Barker v. Braham, 3 Wils. 368; 2 W. Black. 866; Codrington v. Lloyd, 8 Ad. & E. 449; S. C. 3 Nev. & P. 442; 1 W. W. & H. 358.

Liability in such cases attaches to the attorney because he has acted under proceedings which it was incumbent on him to see were absolutely void, and there appears to be no distinction between the liability of the attorney and that of the client. The latter is likewise liable. The act of the attorney is, in point of law, the client's act as well.¹

An attorney who maliciously and illegally sues out process is liable to the party wrongfully sued.² If he deliberately direct the execution of a bad warrant, he takes upon himself the chance of all the consequences. And an attorney directing the issuance of an execution, and refusing to state whether or not he had ordered its levy upon certain property, which was levied on by order of his client, but assuming the responsibility himself, and inviting the suit against himself rather than against his client, is estopped from denying his responsibility in such a suit.³ Where a *capias ad respondendum* has been set aside for irregularity, the attorney who sued it out is liable in trespass,⁴ and an action for false imprisonment lies against the plaintiff's attorney who sues out a void *ca. sa.*, and delivers it himself to an officer, who, following his direction, arrests the defendant thereon.⁵ So where the defendant indorsed his name and address on a warrant sued out, on which plaintiff was committed, this has been held sufficient evidence to support a verdict for

¹ *Newbury v. Lee*, 3 Hill, 523; *Ford v. Williams*, 24 N. Y. 359; *Bowles v. Senior*, 8 Q. B. 677; *Somell v. Champion*, 6 Ad. & E. 407; 2 Nev. & P. 627; *Croser v. Pilling*, 6 Dowl. & R. 129; 4 Barn. & C. 26; *Parsons v. Lloyd*, 2 W. Black. 845; S. C. 3 Wils. 341; *King v. Harrison*, 15 East, 615; *Loton v. Devereaux*, 3 Barn. & Ad. 343; *Bates v. Pilling*, 6 Barn. & C. 38; 2 Dowl. & R. 129; *Liv. Law Mag.* Jan. 1856; *Green v. Elgie*, 5 Q. B. 113; *Dav. & M.* 199; *Braham v. Barker*, 3 Wils. 369; *Codrington v. Lloyd*, 8 Ad. & E. 449. See *Jarmaine v. Hooper*, 13 Law J. N. S. Com. P. 63; *People v. Montgomery*, 18 Wend. 633; *Child v. Dwight*, 7 Paige, 615; 1 Dev. & B. Ch. 171; *Sedley v. Sutherland*, 3 Esp. N. P. C. 202; *Williams v. Smith*, 14 Com. B. N. S. 596; *Carratt v. Morley*, 1 Q. B. 18. As to suing out a writ in a court which the attorney knows has no jurisdiction, see *Goodwin v. Gibbons*, 4 Burr. 2108; *Bates v. Pilling*, 6 Barn. & C. 38. When an attorney is sued for an illegal act, advice of counsel is no defense unless such advice was taken on a fair and full statement of facts. (*Andrews v. Hawley*, 26 Law J. Ex. 323.)

² *Warfield v. Campbell*, 35 Ala. 349; *Green v. Elgie*, 5 Ad. & E. 114.

³ *Ford v. Williams*, 24 N. Y. 359.

⁴ *Codrington v. Lloyd*, 3 Nev. & P. 442; S. C. 8 Ad. & E. 449.

⁵ *Barker v. Braham*, 2 W. Black. 866; *Croser v. Pilling*, 6 Dowl. & R. 129; 4 Barn. & C. 26.

the plaintiff in a plea of not guilty, in an action of trespass for false imprisonment.¹

Although the act of an attorney, in handing over a warrant for execution, may be so divested of any further proof of concurrence on his part that he will not be liable, yet he is responsible, if his conduct, in or after performance of the act, shows a motive beyond the mere wish to discharge a professional duty, as, if after the commitment, he has improperly delayed giving information as to costs, which was demanded by parties wishing to pay such costs, and thereby purge themselves of contempt.² If an attorney has strong reason to suspect that his client is engaged in a systematic course of fraud and forgery, and he continues to act for him as though he were honest, he is guilty of gross misconduct, although not originally cognizant of the frauds, and although not informed of the manner of obtaining the forged documents.³

If the attorney procures or advises a judicial officer to act beyond the scope of his jurisdiction, he is likewise subject to a suit for damages.⁴ As it must be shown that the attorney acts maliciously, an action will not lie for acts done *bona fide* in the prosecution of his client's rights. If an attorney merely causes an execution to be issued, and communicates to the sheriff the directions of his clients to seize certain property, he is not liable, though the seizure was wrongful or on the wrong property, even though, in pursuance of the authority and direction of the plaintiff, and in his name, he execute a bond of indemnity to the officer, nor is he liable for ordering a levy on property if he act in good faith, and on reasonable cause, and with presumable or probable accuracy.⁵

§ 134. Joint liability of attorney and client.—The client may be liable for the wrongful acts of the attorney, as where a

¹ *Green v. Elgie*, 5 Ad. & E. N. S. 99.

² *Ibid.*

³ *In re Barber*, 6 Eng. L. & Eq. 338.

⁴ *Revill v. Pettit*, 3 Met. Ky. 314. See *Sowell v. Champion*, 6 Ad. & E. 407; *Oakley v. Davis*, 16 East, 82; *Williams v. Smith*, 14 Com. B. N. S. 596; *Evans v. Collins*, 5 Ad. & E. N. S. 804.

⁵ *Wigg v. Simonton*, 12 Rich. 583; *Ford v. Williams*, 3 Kern. 577; *Hunt v. Printup*, 28 Ga. 297.

plaintiff's property was taken and sold under an execution wrongfully issued at the instance of the defendant's attorney after an appeal had been perfected; the client was held liable in trespass.¹

In *Barker v. Braham*, 3 Wils. 368, an attorney had taken out a *ca. sa.* against an administratrix without any suggestion that she had been guilty of a *devastavit*, and consequently without authority of law; both attorney and client were held liable for the trespass, and no question was made of the client's responsibility, though there is no suggestion in the report that he personally participated in the proceedings, and the contrary may be inferred. In another English case,² attorney and client were held jointly liable in trespass for the issue and service of an execution by the attorney's agent after the demand had been paid, though neither of them directed or knew of its issue. If the attorney is retained in the cause (and this must be shown) the plaintiffs are trespassers by the act of their attorney. If the attorney is liable the client is also.³

There is, however, a difference between a trespass committed on a third party in assumed execution of process, and one committed on the defendant under process sued out irregularly. A plaintiff can never be held to intend a trespass to third persons; but when one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper, and necessary in the prosecution of the demand, and consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and, therefore, as his act, even though they prove to be unwarranted by the law.⁴

An attorney is not liable for a wrongful or illegal seizure by the sheriff, simply because he prepares the writ or warrant; but when, in addition, he assists in or sends his clerk to assist in the levy thereof, he may become liable for every illegal seizure that

¹ *Foster v. Wiley*, 27 Mich. 244; S. C. 15 Am. R. 185.

² *Bates v. Pilling*, 6 Barn. & C. 38.

³ *Crook v. Wright*, Ryan & M. 278; *Newbury v. Lee*, 3 Hill, 525.

⁴ *Foster v. Wiley*, 27 Mich. 244; S. C. 15 Am. R. 185.

may be made under the warrant, and the plea that he is an attorney is not a defense.¹

§ 135. Liability of third persons to attorneys.—In considering the liability of attorneys to third persons, it may not be inappropriate to add a few words as to the liability of third persons to attorneys. This liability consists chiefly for slanderous or libelous words spoken or written by others about attorneys in their professional character, known in the old books as slander of attorneys.

§ 136. Slander of attorneys.—An attorney may, like any one else, maintain an action for slander or libel, when the words or writings affect his professional character or avocation, and it may be stated, generally, that every kind of defamation imputing misconduct to any attorney in his profession is actionable.²

The slander should be stated as tending to injure the plaintiff's credit and reputation in his profession and business of an attorney. The plaintiff must prove his qualification as an attorney, but it appears that he need not prove that he is in actual practice,³ and if the language of the libel or slander acknowledge the plaintiff's qualification, the proof of the qualification may be dispensed with.⁴

In slander, when the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of the business great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable unless such application be made. But in libel, where the publication is libelous *per se* without reference to the professional character

¹ *Hardy v. Keeler*, 56 Ill. 152.

² Com. Dig. Action on the case for defamation; Bac. Abr. Libel; Vin. Abr. Slander; Stark. Ev. Libel; *Boydell v. Jones*, 4 Mees. & W. 446; *Doyley v. Roberts*, 3 Bing. N. C. 835.

³ *Jones v. Stevens*, 11 Price, 235.

⁴ *Berryman v. Wise*, 4 Term Rep. 366; *Armstrong v. Jordon*, 2 Stark. Ev. 107.

of the plaintiff, the latter may, by extrinsic evidence, connect the libelous words with his professional character, and recover the natural and proximate damages to him in his profession resulting therefrom. In an action for libel, the fact that the words used had reference to the profession or the business of the plaintiff is not the substantive ground of the action. The actionable quality of the words used does not necessarily depend upon that consideration.¹

§ 137. Slander of attorneys—Expressions held slanderous.—If an attorney is slandered in his profession, he may bring an action on the case for defamation. The following expressions have been held actionable. If it be said of an attorney, “You may be ashamed to employ that knave,” etc.; “he is a base knave, and maintains his wife by knavery and cheating tricks”; “he is a cozening, cheating knave”; “thou art a knave, and such knaves made my husband spend his estate”; “he is a cheating knave, and maintains his family by cheating”; “a bribing knave”; “a corrupt man, and deals corruptly”; “thou art an ambidexter”; “he is a cheating attorney”; “your attorney hath taken £20 of you, to cozen me; he hath cozened me £10 in a bill of costs”; “he deals on both sides, and deceives those who put him in trust”; “Mr. H. is a rogue for taking your money, and has done nothing for it”; “he has not entered an appearance for you”; “he is no attorney at law”; “he don’t dare to appear before a judge”; “what signifies going to him”; “he is only an attorney’s clerk, and a rogue”; “he is no attorney”; “he is a forging attorney”; “he is a forging knave”; “tell the knave R. I will teach him, or any attorney, to sue out a writ, for it is tantamount to knave attorney”; “he is a champertor, a common barrator”; “he stirreth up men to suits”; “he is a common maintainer of suits, and a champertor”; “I will have him thrown over the bar”; “a base rascal, I will make him lose his ears”; “he hath the falling sickness, for that disables him

¹ *Sanderson v. Caldwell*, 45 N. Y. 398; S. C. 6 Am. Rep. 105; *Cawdry v. Higley*, Cro. Car. 270; *Chaddock v. Briggs*, 13 Mass. 248; *Davis v. Ruff*, Cheves, 17; *Ayre v. Craven*, 2 Ad. & E. 2; *Dorley v. Roberts*, 8 Bing. N. C. 835; *Jones v. Little*, 7 Mees. & W. 423.

in his profession"; "he cannot read a declaration"; "he hath no more law than a goose, bull," etc.¹

§ 138. Expressions held not slanderous.—It has been held not actionable to say to or of an attorney: "I'll have thee pitched over the bar"; "H. hath found forgery against him"; "he keeps his house and compounds with his creditors"; "I have taken out a judge's order to tax A.'s bill"; "I will bring him to book, and have him struck off the roll."²

Where an attorney averred that the libel was "of and concerning him generally," and "of and concerning him in his business and profession of an attorney," this was held a divisible allegation, and though the plaintiff could not prove he was a certificated or practicing attorney at the time the libel was published, yet he was entitled to maintain the action for the libel on his character generally.³

§ 139. Other expressions.—The words, "he is no more a lawyer than the devil," are actionable when spoken of an attorney;⁴ and so are the words, "he deserves to be struck off the roll."⁵ But the words, "I have taken out a judge's order to tax A.'s bill; I will bring him to book, and have him struck off the roll," are not.⁶ The words, "he has defrauded his creditors, and has been horsewhipped off the course at Doncaster," spoken of an attorney, have been held not actionable, unless applicable to his conduct in his profession; notwithstanding it might tend to injure him morally and professionally.⁷

The plaintiff, an attorney, was employed to bring an action; the defendant was commissioned to adjust the accounts, and, finding that an action was about to be commenced, wrote a letter to plaintiff's client, blaming him for allowing the plaintiff to sue, and concluded by saying: "If you will be misled by an attorney who only considers his own interest, you will have to repent it;

¹ 2 Esp. 624; Com. Dig. tit. Action on the case for defamation, F. 8.

² Ibid.

³ *Lewis v. Walter*, 4 Dowl. & R. 810.

⁴ *Day v. Butler*, 3 Wils. 59.

⁵ *Phillips v. Jansen*, 2 Esp. 624.

⁶ Ibid.

⁷ *Doyley v. Roberts*, 3 Bing. N. C. 835; 5 Scott, 40; 3 Hodges, 154.

you may think, when once you have ordered your attorney to write, he will not do any more without your further orders; but if you once set him about it, he will go to any length without further orders." In an action for a libel it was held that it was properly left to the jury whether this letter applied to the plaintiff individually, or to the profession at large; and that it was unnecessary to direct them to find whether it were a confidential or malicious communication.¹ It is libelous to impute to an attorney "sharp practice" in his profession.²

A declaration in libel stated that the plaintiff was an attorney, and that certain orders had been made by the Court of Queen's Bench for setting aside proceedings, with costs, in an action in which the plaintiff was the attorney of the then defendant, and the defendant was the attorney of the then plaintiff, and that the costs had been ascertained and taxed by one of the masters; that sharp practice in the profession of an attorney is, and is considered to be, disreputable practice, and discreditable to the attorney adopting it; yet that the defendant, intending to cause it to be believed that the plaintiff had been guilty of sharp practice as aforesaid in the said action, and had been reprimanded for it by the master, published of him the following false, ironical, and libelous matter: "An honest lawyer, [thereby meaning the plaintiff, and meaning to represent that he was not an honest lawyer] a person of the name of C. B., etc., was severely reprimanded the other day by one of the masters of the Queen's Bench for what is called sharp practice in his profession," meaning and alluding to the plaintiff's practice with respect to the said orders, and that such practice was sharp practice as aforesaid. It was held that that part of the statement which imputed to the plaintiff sharp practice was sufficiently explained by the introductory matter to show that it was libelous.³

To call an attorney a cheat is actionable,⁴ or "he cannot read a declaration,"⁵ and these without stating special damage. So to say of an attorney in his business, "H. is a rogue for taking

¹ *Godson v. Home*, 3 Moore 223; 1 Ball & B. 7.

² *Boydell v. Jones*, 7 Dowl. P. C. 210; 4 Mees. & W. 446; 1 Horn. & H. 408.

³ *Ibid.*

⁴ *Rush v. Cavanaugh*, 2 Barr, 187.

⁵ *Jones v. Powell*, 1 Mod. 272.

your money, and has done nothing for it; he has not entered an appearance for you; he is no attorney at law; he don't dare to appear before a judge; what signifies going to him?—he is only an attorney's clerk, and a rogue; he is no attorney.”¹ Also the words, “How lawyer Bishop treats his clients,” heading a report of a case in court, are libelous, though they might be justifiable if merely prefixed to a particular case; the words being general are a charge of treatment, in the manner asserted, not of that client only, but of all clients.² The distinction is, that to impute to a professional man ignorance or want of skill in any particular transaction, is not actionable; but if the words were spoken or written of him generally, an action will lie.³ Thus, to say of an attorney in a particular suit, “F. knows nothing about the suit; he will lead you on until he has undone you,” is not actionable, without alleging and proving special damage.⁴ But words imputing a want of integrity, whether used generally or particularly as to some one transaction, are actionable, as to charge an attorney with disclosing confidential communications made to him by his client for the purpose of injuring his client, and of aiding and abetting another person with whom he has combined and colluded.⁵

§ 140. The evidence.—General evidence of the plaintiff's bad character and ill repute in his business as a practicing attorney, cannot be admitted either to contradict an allegation in the declaration that he, during, etc., exercised and carried on the business of an attorney with great credit and reputation, with a view to mitigating damages on the general issue, or in support of averments in the defendant's pleas, pleaded by way of justification, that the plaintiff was a disreputable attorney and practitioner in the law.⁶

In actions to recover damages for slander of attorneys, it is generally necessary (according to some authorities) for the

¹ *Hardwick v. Chandler*, 2 Strange, 1138.

² *Bishop v. Latimer*, 4 L. T. N. S. 775.

³ *Garr v. Selden*, 6 Barb. 416, reversed in S. C. 4 Comst. 91; *Jones v. Powell*, 1 Mod. 272.

⁴ *Foot v. Brown*, 8 Johns. 64. But see *Secor v. Harris*, 18 Barb. 425.

⁵ *Jones v. Powell*, 1 Mod. 272. See *Wakley v. Healey*, 7 Com. B. 591.

⁶ *Jones v. Stevens*, 11 Price, 235.

plaintiff to prove by the roll, or some equivalent record or documentary evidence, that he has been regularly admitted and sworn, with proof that he has practiced in his profession.¹ But where there was a threat that the party would move the court to have the plaintiff struck from the roll, this was considered an admission that the plaintiff was an attorney, and dispensed with further proof.² But proof of admission has, on the other hand, been considered unnecessary by about an equal number of contrary decisions.³

In an action for a libel, the declaration stated that the plaintiff was an attorney, and had been employed by the parishioners of the parish of St. M. as vestry-clerk; that while he was such vestry-clerk certain prosecutions were preferred against one M. for certain misdemeanors, and that in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money belonging to the parishioners were appropriated and applied to the discharge of the expenses and law charges incurred on account of the said proceedings; yet defendant, intending to injure plaintiff in his profession of an attorney, and to cause him to be esteemed a fraudulent practitioner in his said profession and in his office as vestry-clerk, and to be a person unfit to be trusted therein, and to deprive him of the same, and cause it to be suspected that plaintiff had fraudulently appropriated money belonging to the parish, falsely and maliciously published of and concerning plaintiff, and of and concerning his conduct in his office as vestry-clerk, and of and concerning the matters aforesaid, the libel. When the libel was produced at the trial, the imputations appeared to be that the plaintiff had appropriated money belonging to the parishioners in discharge of the expenses of the prosecution after they had terminated. And the court held that it was not a material variance, for the character of the libel was not altered, the misconduct imputed to the plaintiff being the same, whether the money was so applied before or after the termination of the prosecutions, and

¹ *Jones v. Stevens*, 11 Price, 235; — *v. Moor*, 1 Maule & S. 284. See *Green v. Jackson*, Peake, 236.

² *Berryman v. Wise*, 4 T. R. 366.

³ — *v. Moor*, *supra*; *Leicester v. Walter*, 2 Camp. 251. See *Green v. Jackson*, Peake, 236.

the averment, that the libel was published of and concerning the matters aforesaid, not making it necessary to prove literally that the libel did relate to all the matters previously stated; and also, that other libels published by the plaintiff of the defendant, not relating precisely to the same object, could not be received in evidence, either in bar of the action, or in mitigation of damages.¹

A declaration for a libel stated that the plaintiff was an attorney, and that the defendant, intending to injure him in his good name, and in his said profession of an attorney, published a libel of and concerning the plaintiff, and of and concerning him in his said profession. At the trial the plaintiff failed in proving that, at the time of the publication of the libel, he was an attorney. The court held that this was not a fatal variance between the allegation and the proof, the words of the libel being actionable, although not used with reference to the professional character of the plaintiff.²

¹ *May v. Brown*, 4 Dowl. & R. 670; 3 Barn. & C. 113.

² *Lewis v. Walter*, 3 Barn. & C. 138*n*; 4 Dowl. & R. 810. In an action for slander of an attorney, the judge nonsuited the plaintiff, on the ground that the words were mere general abuse, and not of and concerning him in his professional character; and it was not insisted on at the trial that the question ought to be submitted to the jury; the court refused to set aside the nonsuit and grant a new trial. (*Tomlinson v. Brittlebank*, 1 Har. & W. 573.)

In an action by an attorney for words reflecting on him in the conduct of a cause, the proceedings in the cause must be produced in evidence; nor is it sufficient to dispense with the production of them that the costs have been taxed and all the papers given up. (*Parry v. Collis*, 1 Esp. 399.)

CHAPTER VIII.

THE PRIVILEGE OF PROFESSIONAL COMMUNICATIONS.

- § 141. Relative duties.
- § 142. Origin of the rule as to privileged communications.
- § 143. Rule not confined to pending suits.
- § 144. General rules.
- § 145. Rule in the Federal Courts.
- § 146. Rule in equity causes.
- § 147. Burden of proof.
- § 148. Importance of communication not a test.
- § 149. Injunction of secrecy not necessary.
- § 150. Communications held privileged.
- § 151. Communications held not privileged.
- § 152. Disclosures allowed for protection of attorneys.
- § 153. Professional employment necessary.
- § 154. But a formal retainer not necessary.
- § 155. Mode of imparting privileged information.
- § 156. Effect of the client's calling the attorney as a witness.
- § 157. Right of cross-examination of attorney.
- § 158. Effect of attorney making himself attesting witness.
- § 159. Effect of the presence of both parties.
- § 160. What persons the privilege includes.
- § 161. Clerks, interpreters, conveyancers.
- § 162. Client also protected from testifying.
- § 163. Rule as applied to documents.
 - § 164. Deeds.
 - § 165. Testamentary communications.
 - § 166. Fraudulent transactions.
 - § 167. Admissions.
 - § 168. Acts done.
 - § 169. Matters observed.
 - § 170. Communications in view of breaking the law.
 - § 171. Collateral matters.
 - § 172. Third parties.
 - § 173. Disclosing address of client.
- § 174. Privilege not lost by termination of professional relation.
- § 175. Communications made to legal advisers of two parties jointly.
- § 176. Correspondence between co-defendants.
- § 177. Waiver of the privilege.
- § 178. Propositions to compromise.
- § 179. Information received extra professionally.
- § 180. Information not within the scope of professional duty.
- § 181. Rule in criminal cases.
- § 182. Course for attorney to pursue when subpoenaed.

§ 141. Relative duties.—Having reviewed in the preceding chapters the law in relation to those matters which concern the attorney as a member of a certain profession, his vocation, as distinguished from his relative duties to his client, we have next to consider what may be called the law of attorney and client. The attorney's relation with his client usually opens with a statement on the part of the latter concerning the nature of the business about which he has sought his professional adviser. In doing this, he necessarily makes many disclosures of a private and confidential nature, disclosures which are known to the law as "privileged communications," which will constitute the subject of the present chapter, and in which we shall endeavor to ascertain under what circumstances the communication is sacred, and when the client may rest secure that the law will not even allow, unless with his own consent, the confidence to be broken, and when, on the other hand, the seal of secrecy may be removed, and the attorney allowed, or compelled, to state upon the witness-stand the transactions and conversations between himself and his client during the existence of their professional relations.

In a survey of this subject, a brief inquiry will be made as to the origin of the privilege, to be followed by a statement of the general rules which obtain. After this, it will be appropriate to discuss somewhat more in detail how far the privilege extends, and whom it includes, its effect upon the compulsory production of documents, including deeds and testamentary communications. It will be found that there are various exceptions to the rule, or cases not within it—as that the privilege does not extend to communications made with a view of breaking the law; information received extra professionally, and not in the scope of professional duty, nor to collateral matters.

The effect of an attorney's making himself an attesting witness will also be touched upon, as well as the consequences of a termination of the relation, and whether propositions to compromise can properly be divulged, and if so under what circumstances.

§ 142. Origin of the rule.—The origin of the rule in regard to professional communications seems to be as follows: In ancient times, parties litigant were in the habit of coming

into court and prosecuting or defending their suits in person. Subsequently, however, as lawsuits multiplied, and the modes of judicial proceeding became more complex and formal, it became necessary to have these suits conducted by persons skilled in the laws and the practice of the courts, or attorneys. But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men, and make the necessary disclosures to them, if the facts thus communicated were within the reach of their opponent. To encourage the employment of attorneys, therefore, it became necessary to extend to them the immunity enjoyed by the party.¹

If this was the true foundation of this rule, it would follow that the protection might have been confined to communications made with a view to the conduct of a suit, or some judicial proceeding; and in the earlier cases, when the origin of the rule would be most likely to be kept in view, this doctrine would seem to have been most strictly applied, and the witness excused from testifying, on the ground that he was attorney *in the cause*;² but what an attorney learned otherwise than for the purpose of a *cause or suit*, he seems at first to have been bound to communicate.

There is now, however, as we shall presently see, another class of cases, still more numerous, which indicate a different doctrine, viz., that the privilege has no special relation to suits in court or judicial proceedings of any kind, but extends to every case where a member of the legal profession is consulted or employed *professionally*.

§ 143. Whether the rule is confined to pending suits.—

The extent of this obligation of secrecy on the part of the attorney has been the subject of extended discussion both in England

¹ Whiting v. Barney, 30 N. Y. 330; Annesley v. Anglesea, 17 How. St. Tr. 1139; Dixon v. Parmelee, 2 Vt. 185.

² Berd v. Lovelace, Cary, 88; Austin v. Vesey, Cary, 89; Kilway v. Kilway, Cary, 126; Denio v. Codington, Ibid. 143; Wadsworth v. Hamshaw, 2 Brod. & B. 5; Williams v. Mundie, 1 Ryan & M. 31; 1 Car. & P. 158; Broad v. Pitt, 3 Car. & P. 418; S. C. 1 Moody & M. 233; Duffin v. Smith, Peake, 103; Waldron v. Ward, Style, 449; Sparks v. Middleton, 1 Keb. 505; Curtis v. Pickering, 1 Vent. 197; Vaillant v. Dodermead, 2 Atk. 524.

and America, and in regard to it the very highest authorities have differed. Upon the question whether the business, in respect to which the communication is made, must, to make it privileged, relate to a lawsuit, either pending or anticipated, or may respect any other matter where professional aid or advice is necessary, the great names of Lord Tenterden,¹ Lord Kenyon,² Lord Hardwicke,³ and Chief Justice Best,⁴ are found ranged in favor of the restricted rule.

In arriving at a conclusion diametrically opposite to the decisions of these distinguished authorities, it is deemed due to the profession, as well as to the author, to review somewhat extensively the entire question; to give the reasons for the establishment of the opposite rule, and the authorities upon the opposite side, and to say at the outset that in favor of the contrary and broader rule are to be found the not less honored names of Lord Brougham, Lord Lyndhurst, Chief Justice Tindal, and Justice Parke, as well as the great weight of modern authority both in England and in the United States of America.⁵

In a case in chancery,⁶ Lord Brougham gave the subject his most deliberate consideration; and after consulting with Lord Lyndhurst, C. B., Tindal, C. J., and Parke, J., adopted this rule: "If," said he, "touching matters that come within the ordinary scope of professional employment, a solicitor receives

¹ *Williams v. Mundie*, Ryan & M. 34; 1 Car. & P. 158; *Wadsworth v. Hamshaw*, 2 Brod. & B. 5n. See *Peck v. Williams*, 13 Abb. Pr. 68.

² *Cobden v. Kendrick*, 4 T. R. 431; *Duffin v. Smith*, Peake, 108.

³ *Vaillant v. Dodemead*, 2 Atk. 524.

⁴ *Broad v. Pitt*, 3 Car. & P. 518; *Moody & M.* 233.

⁵ *Greenough v. Gaskell*, 1 Mylne & K. 98; *Comack v. Heathcote*, 2 Brod. & B. 4; S. C. 4 Moore, 357; *Herring v. Cloberry*, 1 Turn. & Phil. 91; S. C. 6 London Jurist, 202; *Chirac v. Reinicker*, 11 Wheat. 294; *McLellan v. Longfellow*, 32 Me. 494; *Sargent v. Hampden*, 38 Me. 581; *Parker v. Carter*, 4 Munf. 273; *Whiting v. Barney*, 38 Barb. 393; *Johnson v. Sullivan*, 23 Mo. 474; *Durkee v. Leland*, 4 Vt. 615; *Foster v. Hall*, 12 Pick. 89, per Shaw, C. J.; *Bolton v. Liverpool*, 1 Mylne & K. 88; *Moore v. Terrill*, 4 Barn. & Ad. 870; *Peter v. Watkins*, 3 Bing. N. C. 421; *Mynn v. Joliffe*, 1 Moody & R. 327; *Stroder v. Seyton*, 2 Ad. & E. 171; *Shellar v. Harris*, 5 Car. & P. 592; *Taylor v. Blacklow*, 3 Bing. N. C. 421; *Minet v. Morgan*, Law R. 8 Ch. 361; *Turton v. Barber*, Law R. 17 Eq. 329; *Lawrence v. Campbell*, 4 Drew. 485; *Walker v. Wildman*, 6 Madd. 47; *Wilson v. Trout*, 7 Johns. Ch. 25; 2 Cow. 195; *King v. Boddington*, 8 Dowl. & R. 726; *Clark v. Clark*, 1 Moody & R. 5; *Wetherbee v. Ezekial*, 25 Vt. 47; *Parkhurst v. McGraw*, 24 Miss. 134; *Swift v. Perry*, 13 Ga. 138; *Miller v. Weeks*, 22 Pa. 89; *People v. Barker*, 56 Ill. 298.

⁶ *Greenough v. Gaskell*, 1 Mylne & K. 98.

a communication in his professional capacity, either from a client or on his account, and for his benefit, in the transaction of his business, or, which amounts to the same thing, if he commits to paper in the course of his employment on his behalf, matters which he knows only through his professional relation to his client, he is not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as a party or witness." And in another case in the same court,¹ Lord Lyndhurst reviewed and strongly enforced this principle: "I am of opinion," said he, "that the principle acted upon in the case of *Cromack v. Heathcote*² is the correct principle: namely, that where an attorney is professionally employed in order to transact professional business, whatever passes between the client and his attorney, for the purpose of enabling him to transact that business, is a privileged communication, which the client may object to have given in evidence. The decision in the Common Pleas is in accordance with the previous decisions, and the general understanding and practice of the profession. Several cases at *nisi prius* were cited, in which Lord Chief Justice Tenterden had laid down the rule with considerable limitations, and had restricted it to communications made with reference to causes instituted or about to be instituted; but afterward extended it to cases where doubts and controversies existed, which might lead to litigation. This was narrowing the rule too much; for it might be necessary to consult a legal adviser on many other difficulties, as, for instance, on titles to property; and communications on such a subject must also be privileged. It appears that, in one case at *nisi prius*, Chief Justice Best was inclined to adopt the decision of Lord Tenterden. That decision, however, is not supported by any previous authority, and cannot be supported on principle. The restriction of the rule is not consistent with sound principle; for it may and would often be of as much importance that communications made at other times, as well as in the progress of a cause, should be protected. In the ordinary transactions of the world people must resort for legal advice to legal advisers, and these

¹ *Herring v. Cloberry*, 1 Turn. & Phil. 91.

² 2 Brod. & B. 4; S. C. 4 Moore, 357.

communications must be privileged. I think, if the case stood here, I should adhere to the rule—that such communications are entitled to protection. But the case does not, in fact, rest here. The question came before Lord Brougham, and was much considered by him; and he delivered a detailed judgment which supports the decision of the Common Pleas. There were cases, also, before Lord Cottenham, in which, though he was not called on to pronounce an opinion on the question, it is clear from the scope of his observations, and the course he pursued, that he agreed with the Court of Common Pleas in their judgment. There can be no doubt that the principle applies to the evidence of Mr. Pearse; and the rule I lay down is this: that where an attorney is employed by a client, professionally, to transact professional business, all communications relative to the business on which he is employed are privileged communications; and that this privilege is the privilege of the client, and not of the attorney.”

Whatever may have been the origin of the privilege, the reason for a contrary rule has been well expressed by Lord Brougham.¹ He says: “If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all precautions superfluous.” And in fact, the English rule, as sustained by the weight of authority, is now, that *prima facie* all communications passing between an attorney or solicitor and his client, with relation to business to be transacted by the former for the latter, are to be deemed privileged,² and it is not necessary for the purpose that the communications should have been made in the contemplation of litigation. They are equally privileged if they relate to and are made in the course of the dispute which is the subject of the suit.³ And the privilege extends to all cases where a communication is made to an attorney or other

¹ *Greenough v. Gaskell*, 1 Mylne & K. 98; 3 Watts, 20; *Weeks v. Argent*, 16 Law J. N. S. Exch. 210; *Turquand v. Knight*, 2 Mees. & W. 101; *Moore v. Terrell*, 2 Barn. & Adol. 876.

² *Pearce v. Pearce*, 16 Law J. Ch. 153; *Herring v. Cloberry*, 11 Law J. N. S. Ch. 189; 1 Phill. 91, 96.

³ *Claggett v. Phillips*, 2 Younge & C. 82; *Hughes v. Garnous*, 6 Beav. 352.

legal adviser, in his professional capacity,¹ or relating to matters within the ordinary scope of an attorney's duty,² as a negotiation for the loan of money,³ the sale of an estate,⁴ or the preparation of a deed,⁵ and the restriction is lasting, for the attorney's mouth is shut forever; nor does it matter whether or not, at the time the evidence is offered, the attorney continues in practice, or be on the roll of the court.⁶

"The foundation of the rule," says Lord Brougham, "is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings."⁷ In England, where an attorney acts as *advocate* in a legal proceeding, he has been precluded altogether from giving any evidence.⁸ But in America no distinction is made on this head between attorney and counsel, nor is the testimony absolutely excluded as to a matter of fact of which he obtained a knowledge independent of his professional character.⁹

"A lawyer, no matter in what capacity he may be employed," says Wharton, "is not, by Anglo-American law, permitted to disclose communications made to him by his client in the course

¹ *Turquand v. Knight*, 2 Mees. & W. 101. See also 1 Caines, 157; 11 Paige, 377.

² *Carpmael v. Powis*, 1 Phill. 687. See also *Parker v. Carler*, 4 Munf. 273; 5 N. H. 94.

³ *Turquand v. Knight*, 2 Mees. & W. 100; *Harvey v. Clayton*, 2 Swanst. 221; *Anon. Skin.* 404.

⁴ *Carpmael v. Powis*, 1 Phill. 687. See also *Foster v. Hall*, 12 Pick. 89; 3 Watts, 20.

⁵ *Cromack v. Heathcote*, 2 Ball & B. 4; *Robson v. Kempe*, 4 Esp. 235; 5 Esp. 52; *Parker v. Carter*, 4 Munf. 273; 14 Pick. 416.

⁶ *Wilson v. Rastall*, 4 Term Rep. 759; *Cholmondeley v. Clinton*, 19 Ves. 261. See *Bank v. Mersereau*, 3 Barb. Ch. 528.

⁷ *Greenough v. Gaskell*, 1 Mylne & K. 103. See also *Anon. Skin.* 404, pl. 40; *Wilson v. Grove*, Toth. 275; *Rhoades v. Selin*, 4 Wash. C. C. 718; 3 Yates, 4; *Yordan v. Hess*, 13 Johns. 492; 11 Wheat. 280; *Parker v. Carler*, 4 Munf. 273; *Wright*, 136; 1 Porter, 433; *Riley Ch.* 9.

⁸ *Stone v. Byron*, 16 Law. J. Q. B. 32; 4 Dowl. & L. 393; *Dunn v. Packwood*, 1 B. C. R. 312; 11 Jur. 242; *Pearce v. Pearce*, 16 L. J. Ch. 157.

⁹ *Spart v. Middleton*, 1 Keb. 505; *Riggs v. Denniston*, 3 Johns. Cas. 198

of their professional relations. Oral communications are thus protected,¹ and *a fortiori* does the privilege extend to cases stated for the opinion of counsel,² and to written instruments held by counsel or attorneys on behalf of clients.³ The privilege is essential to public justice; for, did it not exist, 'no man would dare to consult a professional adviser with a view to his defense, or to the enforcement of his rights.'⁴ Nor is the privilege in any way affected by the statutes making parties witnesses,⁵ though it is said that a party making himself a witness cannot, on ground of the statute, refuse to answer as to his confidential communications to his counsel."⁶

If the protection were confined to cases where proceedings have been commenced, the rule would exclude the most confidential, and it may be the most important, of all communications: those made with a view of being prepared for instituting or defending suit, up to the instant that the process of the court issued. If it were confined to proceedings begun or in contemplation, then every communication would be unprotected, which a party makes with a view to his general defense against attacks which he apprehends; although at the time no one may have resolved to assail him.⁷ But were it allowed to extend over such communications, the protection would be insufficient if it only

¹ Wharton on Evidence, sec. 576; *Cromack v. Heathcote*, 2 Brod. & B. 4; *Carmichael v. Powis*, 1 Phill. 692; *Greenough v. Gaskell*, 1 Mylne & K. 101; *Chant v. Brown*, 9 Hare, 790; *Jenner v. R. R.* 7 Q. B. 767; *Skinner v. R. R.* L. R. 9 Ex. 298; *Woolley v. R. R.* L. R. 4 C. P. 602; *Maxham v. Place*, 46 Vt. 434; *Higbee v. Dresser*, 103 Mass. 523; *Williams v. Fitch*, 18 N. Y. 550; *Britton v. Lorenz*, 45 N. Y. 57; *Graham v. People*, 63 Barb. 468; *Bellis, In re*, 38 How. N. Y. Pr. 79; *Jenkinson v. State*, 5 Blackf. 465; *Orton v. McCord*, 33 Wis. 205; *Chaboon v. Commonwealth*, 21 Gratt. 822; *State v. Hazleton*, 15 La. An. 72.

² *Pearce v. Pearce*, 1 DeGex & S. 25.

³ *Laing v. Barclay*, 3 Stark. R. 42; *Doe v. James*, 2 Moody & R. 47; *Volant v. Soyler*, 13 Com. B. 231; *Hawkins v. Howard*, R. & M. 64; *Bargaddie Coal Co. v. Wark*, 3 Macq. 468; *Crosby v. Berger*, 11 Paige, 377.

⁴ Lord Brougham in *Greenough v. Gaskell*, 1 Mylne & K. 103.

⁵ *Montgomery v. Pickering*, 116 Mass. 227; *Brand v. Brand*, 39 How. Pr. 193; *Barker v. Kuhn*, 38 Iowa, 395.

⁶ *Woburn v. Henshaw*, 101 Mass. 193.

⁷ *Hare on Discovery*, 2d ed. 148, 158; *Greenough v. Gaskell*, 1 Mylne & K. 98, 100, per Lord Brougham, 101, 115. See *Ford v. Tennant*, 32 Beav. 162. The cause need not be commenced. (*Clark v. Clark*, 1 Moody & R. 3; *Cromack v. Heathcote*, 4 Moore, 357; 2 Brod. & B. 4.) The client need not be a party to a cause in court. (*Rex v. Withers*, 2 Camp. 578; *Gillard v. Bates*, 6 Mees. & W. 547; 8 D. P. C. 774.)

included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry.

Thus, an attorney, consulted upon a man's title to an estate, is not at liberty to divulge a flaw;¹ and so with the protection given to a scrivener, and attorney's clerks.

No one can be compelled to disclose to the court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission, although it may have been made before any dispute arose as to the matter.²

The rule extends to the proof of the contents of a deed of which an attorney first obtained a knowledge by having obtained and read it at the suggestion of counsel at the consultation in the cause.³ Nor can an attorney be compelled to produce any deeds or muniments of his client's title, though he may be asked whether

¹ *Greenough v. Gaskell*, 1 Mylne & K. 98; *Herring v. Cloberry*, 1 Ph. 91; *Jones v. Pugh*, *Ibid.* 96; *Harvey v. Clayton*, 2 Swaust. 221; *Carpmeal v. Powis*, 1 Ph. 687; *Davies v. Waters*, 9 Mees. & W. 608; *Wheatley v. Williams*, 1 Mees. & W. 553; *Taylor v. Forster*, 2 Car. & P. 195.

² *Stephen on Ev. Art.* 116. "No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client, during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser. This does not extend to—1. Any such communication as aforesaid made in furtherance of any criminal purpose; 2. Any fact observed by any legal adviser in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not; 3. Any fact with which such legal adviser became acquainted otherwise than in his character as such. The expression 'legal adviser' includes barristers and solicitors, their clerks, and interpreters between them and their clients." (*Stephen on Ev. Art.* 115.)

³ *Davies v. Waters*, 9 Mees. & W. 608; 1 Dowl. N. S. 651; 11 Law J. Exch. 214. See, also, *Jackson v. Burtis*, 14 Johns. 391; 17 Johns. 335; 18 Johns. 330; 11 Paige, 377; 1 Hill, 33; 4 Wend. 558; 6 Barb. 116; 7 Wend. 216.

or not he is in possession of any particular deed, in order to enable secondary evidence to be given of its contents.¹

The theory of the later cases is that communications made to a counsellor, when made in the character of a legal adviser, are to be protected, as the privilege of the party asking the advice. The rule is founded on principles of public policy. It has been found necessary to the protection of persons surrounded and embarrassed by difficulty, to the end that they may have the advice and counsel of persons skilled in the law upon a complete disclosure of all that pertains to the transaction that affects their interest, property, or liberty, with the full assurance that the communications thus made are as safe with their legal adviser as within their own breasts. These facts are the privilege of the client, and not that of the attorney.²

The rule requires that the entire professional intercourse between client and attorney, whatever it may have consisted in, should be protected by profound secrecy. The exemption is not confined to advice given or opinions stated. It extends to facts communicated by the client—all that passes between client and attorney in the course and for the purpose of the business. So stringent is the rule that an attorney to whom application was made to draw a deed, and who declined the employment, was not permitted to disclose communications made by the party to the effect that his object was to make a fraudulent conveyance. The interests of justice and the protection of private rights demand the strictest confidence in this relation.³

The rule which excludes testimony of professional communications is broad enough to embrace a case where the one seek-

¹ *Bate v. Kinsey*, 1 Cramp. M. & R. 38; *Davies v. Waters*, 1 Dowl. N. S. 651; 11 Law J. Exch. 214. See also cases cited *supra*, and 3 Day, 499; 4 Vt. 612; *Anon.* 8 Mass. 390; *State v. Squier*, 1 Tyler, 147; *Coates v. Birch*, 2 Q. B. 252; 4 Wash. C. C. 718.

² If an attorney should so far forget his professional duty as to voluntarily offer to give in testimony facts communicated to him by his client, without the express consent of the client so to do, "a short way of preventing him would be," said an English judge, "by striking him off the roll." (*Earl of Cholmondeley's Case*, 19 Ves. 261; *People v. Barker*, 56 Ill. 299.) Where an attorney has received confidential communications from a partnership firm, one member of the firm cannot release him from his obligation of secrecy. It is the privilege of all, and the consent of every member is necessary. (*People v. Barker*, 56 Ill. 299.)

³ *Langsfield v. Richardson*, 52 Miss. 441; *Hering v. Choberry*, 1 Phila. 91; *Crisler v. Garland*, 11 Smedes & M. 138.

ing counsel pays no fee, and employs other attorneys in the prosecution of the business, and even where the lawyer consulted is afterward employed on the other side. The term "client," as used in a statute, should be understood in its most enlarged sense, and the prohibition should close the mouths of all who have listened to disclosures looking to professional aid. The rule should be universal, and apply to all who communicate facts, expecting professional advice, or it will fail to answer its ends. Its limitations may be unknown to laymen, and without feeling a perfect freedom in all cases, instead of the perfect confidence that should exist, the intercourse might be restrained by fear and marred by dissimulation on the part of the client, and the object of the rule be defeated; and, besides, a door would be opened to fraud. One might seek advice expecting not only to pay but to retain in an anticipated litigation, and after his story had been heard, the retainer might be declined, and the information be used against him; also, an obstacle would be thrown in the way of the settlement of disputes. Public policy requires that persons should feel that they may securely say anything to members of the profession in seeking aid in their difficulties, although the person whose advice they seek may have been employed, or may be afterward employed, against them.¹

We understand, therefore, that both the English and American rule now is, that all communications made by a client to his counsel for the purposes of professional advice or assistance are privileged, whether such advice relates to a suit pending, one contemplated, or to any other matter proper for such advice.²

But where the communications are made in the presence of all the parties to the controversy, they are not privileged, and the evidence is competent between such parties.³ As the rule is one chiefly for the protection of the client, the willingness of the attorney to divulge the privileged communications is not

¹ *Cross v. Riggins*, 50 Mo. 335.

² *Yordan v. Hess*, 13 Johns. 492; *Riley v. Johnston*, 13 Ga. 260; *King v. Barrett*, 11 Ohio St. 261; *Holmes v. Borbin*, 15 La. An. 553; *McClellan v. Longfellow*, 32 Me. 494; *Parker v. Carter*, 4 Muuf. 273; *Cross v. Riggins*, 50 Mo. 335; *Carnes v. Platt*, 15 Abb. Pr. N. S. 337.

³ *Carr v. Weld*, 15 N. J. L. 314; *Dunn v. Amos*, 14 Wis. 106; *Whiting v. Barney*, 30 N. Y. 330; *Britton v. Lorentz*, 45 N. Y. 51; *Rice v. Rice*, 14 B. Mon. 417.

enough to warrant receiving them.¹ Nor is the privilege affected by the fact that no fee was asked for or expected.²

The test seems to be: Are the communications confidential? Are they necessary in the course of business?³

§ 144. General rules.—The general rule established by an apparent weight of authority, independent of statutory provisions, may then be stated in regard to privileged communications as follows: An attorney is privileged from giving evidence of any confidential communication made to him by his client, or concerning which he has been informed in his professional capacity as attorney for the client. The privilege is that of the client, and not that of the attorney.⁴ If the client therefore waive the privilege, the attorney cannot refuse to answer and be protected by the court in his refusal.⁵ An agent of an attorney appears to be included within the rule, and cannot be examined as to communications with a client on the subject of the action, in order, for instance, to prove his identity.⁶ And the rule has been extended to an interpreter who was present at a conversation between a foreigner and his attorney, and the interpreter has been held to the same secrecy as the attorney himself, and was not allowed to divulge the facts confided to him after the cause, even though the purpose of the confidence was at an end.⁷

An attorney's clerk, acting for his master, is also within the rule.⁸ But not a person who is not an attorney, but to whom one makes confidential communications respecting his cause, erroneously supposing the other to be an attorney.⁹

It has been laid down as a general rule, also, that confidential communications between attorney and client are not to be re-

¹ *Chirac v. Reinecker*, 11 Wheat. 280; *Jenkinson v. State*, 5 Blackf. 465.

² *Hunter v. Von Bomhorst*, 1 Md. 504; *March v. Ludlum*, 3 Sand. Ch. 35; *McManners v. State*, 2 Head, 213.

³ *Greenough v. Gaskell*, 1 Mylne & K. 98; *Mills v. Griswold*, 1 Root, 383; *Calkins v. Lee*, 2 Root, 363.

⁴ *Parkhurst v. Lawton*, 2 Swanst. 216.

⁵ *Vailliant v. Dodmead*, 2 Atk. 524; 2 Swanst. 221; *Duchess of Kingston's Case*, 20 How. St. Tr. 613, 614; *Rastall v. Wilson*, 4 Durn. & E. 759; *Parkins v. Hawkshaw*, 2 Stark, 239.

⁶ *Moss v. Brander*, 1 Phil. 266.

⁷ *Du Barre v. Livette*, Peake, 77.

⁸ *Taylor v. Foster*, 2 Car. & P. 195; *Studdy v. Sanders*, 2 Dowl. & R. 347.

⁹ *Fountain v. Young*, 6 Esp. 113.

vealed at any period of time, unless by the client's consent; nor in an action between third persons; nor after the proceedings to which they refer are ended; nor after dismissal of the attorney.¹

The information, however, to be privileged, must have been communicated in matters as to which the attorney stood strictly in the relation of an attorney or solicitor to the party communicating it; and it must also have been confidentially communicated.² Communications, therefore, made before the attorney was professionally concerned, are not privileged; nor are they when made after the professional employment has ceased;³ nor such as the attorney obtains in any other way than as the confidant of his client. An attorney who desires to protect himself from testifying, must, therefore, show that the knowledge and information came solely from the client. Information derived from other persons, or other sources, although obtained while acting as attorney, is not privileged.⁴

Necessary communications between an attorney and his client, through an unprofessional person, are privileged; but if they are not wholly of a professional or confidential nature, it seems that the privilege will not be allowed.⁵ Where an attorney got possession of a forged promissory note professionally, from his client, a prisoner in custody for the forgery, an order was refused to compel the attorney to produce the note or to give a copy of it to the clerk for the purpose of setting it out in the indictment, and on the trial it was held he was not bound to produce it.⁶

"The privilege extends to all knowledge possessed by the

¹ *Wilson v. Rastall*, 4 Durn. & E. 759, 60; *Sloman v. Herne*, 2 Esp. 695; *Rex v. Withers*, 2 Camp. 578; *Gainsford v. Grammar*, *Ibid.* 10; *Parkhurst v. Lawton*, 2 Swanst. 194, 221; 1 Phil. Ev. 7th ed. 110.

² *Parker v. Carter*, 4 Munf. 273; *Riggs v. Denniston*, 3 Johns. Cas. 198; *Rhodes v. Selin*, 4 Wash. C. C. 718; *Wright*, 136; 3 *Yates*, 4; *Johnson v. Davome*, 19 Johns. 134.

³ *Cutts v. Pickering*, 1 Vent. 197; *Lord Say and Seal's Case*, 10 Mod. 40; *Cobden v. Kendrick*, 4 T. R. 431; *Yordan v. Hess*, 13 Johns. 492. See, also, *Perry v. Smith*, 1 Law J. N. S. 269; 4 *Mees. & W.* 681; 1 *Car. & M.* 554; *Shore v. Bedford*, 12 Law J. Com. P. 138; 5 *Man. & G.* 271; 3 *Wend.* 393; *Wright*, 136; 19 *Johns.* 134; 3 *Edw. Ch.* 399.

⁴ *Crossby v. Berger*, 4 *Edw. Ch.* 256; *Bank v. Messereau*, 7 *Paige*, 517; *Spenceley v. Schulenberg*, 7 *East*, 357; *Coventry v. Tannahill*, 1 *Hill*, 33; *Sawyer v. Birchmore*, 3 *Mylne & K.* 372; *Desborough v. Rawlins*, 3 *Mylne & K.* 515; *Robinson v. Flight*, 8 *London Jurist*, 888. See *Greenough v. Gaskell*, 1 *Mylne & K.* 98.

⁵ *Bunbury v. Bunbury*, 2 *Beav.* 173.

⁶ *Rex v. Smith*, 1 *Phill. Ev.* 132.

lawyer which he would not have obtained if he had not been consulted professionally by his client.¹ Even when a solicitor writes letters to a third party for the purposes of a suit, the answers are privileged;² and so letters passing between a country solicitor and his town agent are privileged.³ Communications, even with lay agents, with regard to the preparation of a case, are in like manner protected."⁴

In an action by the payee of a promissory note against the maker, it appeared that the plaintiff had acted as attorney to the defendant, and while holding that capacity had obtained documentary evidence from the defendant which he stated was wanting to assist her in preparing a case for counsel: and on this he relied to take the case out of the Statute of Limitations. It was held that the evidence was inadmissible for the plaintiff. Platt, B., observed that it would never have been in the hands of the attorney except for the purpose of his preparing a case for counsel; and Martin, B., added: "The client might be in error in thinking the communication necessary to be laid before counsel; but if she communicated it *bona fide*, considering it necessary, the communication was privileged, and could not be divulged."⁵

If a matter be disclosed to an attorney in a cause, he cannot be permitted to give it in evidence either in that or in any other action. Where a plaintiff, having a demand upon a defendant, and before the action was commenced the defendant employed his attorney to make certain propositions to the plaintiff in regard to the controversy, the attorney, it was held, could not be examined as to what his client, the defendant, said upon the occasion; but what the attorney said when he made the propositions was considered evidence against the defendant, without further proof of the attorney being authorized by him. The fact of the attorneyship was sufficient.⁶ It has been held that an attorney is not bound to speak as to the particulars of a bill of exchange

¹ Woods v. Woods, 4 Hare, 83; Wharton on Evidence, sec. 577; Greenough v. Gaskell, 1 Mylne & K. 98, per Lord Brougham.

² Simpson v. Brown, 33 Beav. 483.

³ Catt v. Towle, 19 Week. R. 56.

⁴ Ross v. Gibbs, Law R. 8 Eq. 522; Preston v. Carr, 1 Younge & J. 175.

⁵ Cleave v. Jones, 6 Ex. 573; Wharton on Evidence, sec. 577, note.

⁶ Gainsford v. Grammar, 2 Camp. 9; Wilson v. Rastall, 4 Durn. & E. 753.

when the knowledge was only derived from the bill being intrusted to him by his client.¹

The seal which the law once fixes upon such communications remains forever, unless removed by the party himself in whose favor it was there placed. And where the privilege belongs to several clients, it is said that no one of them, nor even a majority, contrary to the expressed will of the others, can waive the privilege, so as legally to justify the attorney in giving testimony in relation to such privileged communications. Nor does the fact that the client whose assent to the removal of the seal of professional confidence from privileged communications has not been obtained, is not a party to the suit in which his attorney is called upon to testify, alter the case.²

Neither will the fact that an attorney was a subscribing witness to a warrant of attorney prepared by him for his clients to execute, alter the question as to the admissibility of his evidence, tending to the conclusion that the object of giving the warrant of attorney, and having judgment entered thereon, was to hinder and delay their creditors in the collection of their debts; and that the judgment was given for a much larger sum than was justly due to the judgment-creditor.

An attorney is bound to disclose what took place in the preparation and concoction of the instrument which he witnessed, or at any other time, not connected with the execution of such instrument. Thus, an attorney who is professionally employed to prepare a deed for his client, and who afterward witnesses its execution, may be compelled, not only to prove the execution of such deed, but also to testify whether it was ante-dated; whether it was in the same form in which it now appears, at the time of its execution, or has been altered; and whether it was actually delivered at the time he subscribed his name thereto as a witness: so if the deed has been lost, or is in the hands of the adverse party, who refuses to produce it upon the trial, or for the purposes of suit, the attorney who witnessed the deed may be compelled to testify as to the contents thereof, although in the preparation of such deed he was professionally employed.³

¹ *Beard v. Ackerman*, 5 Esp. 120.

² *Bank of Utica v. Mersereau*, 3 Barb. Ch. 596; *Wilson v. Rastall*, 4 T. R. 760; *Rex v. Withers*, 2 Camp. 578.

³ *Bank of Utica v. Mersereau*, 3 Barb. Ch. 597-8; *Robeson v. Kemp*, 5 Esp. 53:

§ 145. General rule in the Federal Courts.—The general rule holds good in the courts of the United States. The admission in evidence of previous communications to counsel, when made professionally, is not allowed by Federal statute, and, remarks Mr. Justice Bradley, “it is to be hoped that it will not soon be. The protection of confidential communications, made to professional advisers, is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance.”¹

§ 146. In equity causes, it has been held that an attorney's privilege will also prevail where the communication is made by one of the parties to the suit; and that it extends to every communication for professional assistance, and whether made directly or through the intervention of other parties, so long as it is in behalf of a party to the cause, but not where the solicitor is employed in unprofessional matters, as, for instance, in negotiations for the purchase of an estate.²

The attorney must disclose public acts, as, for instance, what passed at the execution of a deed, he being a witness, or where he was sent by his client with orders to put a judgment in force; but he is not bound to disclose private conversations as to the reasons for executing the deed. In such a case, depositions have been referred to a master, to ascertain what part came to the knowledge of the witness in confidence as an attorney, and what publicly as a witness, so that the former might be suppressed.³

Bills of discovery were sometimes filed against attorneys, to discover matters relative to the business with their clients. Pleas that the defendants were attorneys, and faithfully managed the business for their clients, and ought not to discover the same, were generally considered good pleas. Where a bill was filed

Lord Say and Seales' Case, 10 Mod. 40; Assignees of Blakely v. Kemp, 4 Esp. 235; Lessee of Devoy v. Burke, 2 Fox & S. 191.

¹ Connecticut Mut. Life Ins. Co. v. Schaefer, 4 Otto U. S. 457.

² Parker v. Lowten, 2 Swaust. 201, per Lord Eldon; Walker v. Wildman, 6 Mod. 47.

³ Sandford v. Remington, 2 Ves. 189.

for the discovery of a deed *and* its contents, the court ordered the discovery as to whether there was such a deed, where it was and to whom it was delivered, and when the attorney last saw it, and in whose custody it was, but refused to grant the prayer to discover the dates or contents of the deed.¹ As the solicitor may, by his answer to a bill against him and his client, refuse to discover any deeds or facts confidentially communicated to him, so exceptions to his answer for shortness in not making such disclosure, and relying on that defense, have been overruled.²

§ 147. Burden of proof.—The burden is upon the party who seeks to have his statements suppressed as evidence, because they are privileged. The facts that would make them so must be proved. Where an attorney testified that he never understood “he was counsel, or to be counsel, in this matter,” etc., this took the statements made out of the list of privileged communications.³

§ 148. Importance of the communication not a test. Whether the communications of a client to his attorney shall or shall not be regarded as matters of professional confidence, and therefore be excluded, does not depend upon their importance or materiality in the prosecution or defense of the suit, but on the character of the communications. The client cannot be expected to be fully informed how far many matters communicated may be important or unimportant, material or immaterial; nor can he reasonably be expected to decide and to be governed by such considerations in making his disclosures—his object being to communicate everything in any way appertaining to the transaction.⁴

§ 149. Injunction of secrecy unnecessary—Effect of declining retainer.—To entitle a client to the protection of the rule, it is not essential that he be apprised of it, or that he enjoin secrecy upon the attorney, nor that the client should be aware of his right.⁵ Declarations made to an attorney with

¹ *Kingston v. Gale*, Finch, 259; *Legard v. Foote*, Ibid. 82.

² *Stratford v. Hogan*, 2 Ball & B. 164.

³ *Earle v. Grout*, 46 Vt. 113.

⁴ *Aiken v. Kilburne*, 27 Me. 252.

⁵ *McLellan v. Longfellow*, 32 Me. 494.

reference to his employment in a cause fall under the privilege, although the attorney declines the engagement, because the latter may not be able to determine whether to render or withhold his professional aid until the applicant has disclosed the merits of his case.¹

§ 150. Communications held privileged.—An attorney for a plaintiff in ejectment cannot be made to testify whether a plaintiff had not employed him to sue for his individual benefit, and had authorized his name as administrator to be used for his individual benefit.² Where an attorney was consulted as to the means of avoiding responsibility for the costs of several suits, which another had instituted in his name, and the latter had advised that a motion be made to the court, to compel the plaintiff to give security, and in the course of the conversation the party consulting remarked that he had four or five hundred dollars of the money of the plaintiff in his hands—this was held privileged: this was held to have been made professionally.³

An attorney who has obliterated an indorsement on a bond belonging to his client, on which bond a suit is pending, and who states upon oath that he has no knowledge of the contents of the indorsement but that which he had received as attorney in the cause, is not bound to testify as to the contents of that indorsement.⁴ Where a solicitor, who had been employed to foreclose a mortgage, was asked, as a witness before an examiner, whether he had received any instructions from the complainants, his clients, as to the sale thereunder and the amount to be bid, he was excused from answering.⁵

An attorney cannot be called upon to testify respecting the condition and appearance of a deed of trust and the trust-notes at the time when they were committed to him to bring suit of foreclosure upon. Nor does the fact that the communications to the attorney were made in the form of deeds, or not, exclude them from the protection of the rule.⁶ Even where, by the admissions

¹ *Sargent v. Hampden*, 38 Me. 581.

² *Stephens v. Roe*, 37 Ga. 289.

³ *Brazier v. Fortune*, 10 Ala. 516; *State v. Marshall*, 8 Ala. 302.

⁴ *Crawford v. McKissack*, 1 Port. 433.

⁵ *Stuyvesant v. Peckham*, 3 Edw. Ch. 579—affirmed on appeal to chancellor.

⁶ *Gray v. Fox*, 43 Mo. 570; 1 Greenl. Ev. sec. 241; *Brown v. Payson*, 6 N. H. 443; *Coveney v. Tannahill*, 1 Hill. 33.

of a party, a champertous contract is established between him and his attorney, the latter is not a competent witness to prove that the statements of his client are false, and that no such contract was entered into.¹ In an action on a promissory note, the plaintiff's attorney is privileged from being called upon to prove that the note in suit belongs to other persons than the plaintiff, and that the plaintiff is but a trustee with respect to it.²

Counsel for a bankrupt is privileged from answering, when examined as a witness in the bankruptcy proceedings, as to any information concerning the affairs of the bankrupt, which he received as such counsel from the bankrupt, or from persons to whom he was referred by the bankrupt for the purpose of obtaining such information as such counsel. But he may be required to answer questions not coming within this principle.³ A claimant who deposed that "obstacles having arisen in granting a second lease, one only was granted," was asked, on cross-examination, whether the obstacles were suggested by him to his solicitor, or by his solicitor to him, and he was held not bound to answer, though the communication was before any litigation was in contemplation, and the bill of costs delivered in the same matter was also held to be privileged. There is now no distinction between communications made with a view to litigation, and simply before litigation. Both, if confidential, are privileged.⁴

The attorney for the original defendant cannot be called as a witness to prove the debt, in an action against the sheriff for an escape, where he became acquainted with the business only by the information of his client.⁵ The court will not order a defendant to produce letters which passed between him and his solicitor in the professional relation, in the progress of the cause, or with reference to it, previously to its being instituted, or which contain legal advice; as where the object of the letter was to direct the solicitor to take the opinion of counsel upon the question in dispute.⁶

¹ *Dowell v. Dowell*, 3 Head, 502.

² *Miller v. Weeks*, 22 Pa. 89.

³ *In re Aspinwall*, 7 Ben. 433.

⁴ *Turton v. Barber*, 17 Law R. Eq. 329; *Minet v. Morgan*, 8 Law R. Ch. 361.

⁵ *Sloman v. Loudon*, 2 Esp. 696.

⁶ *Garland v. Scott*, 3 Sim. 396; *Vent v. Parcey*, 4 Russ. 193.

Where an attorney came to the knowledge of a deed or instrument having been destroyed, from the fact of his employment as an attorney, he cannot be examined as to the fact. An attorney got the possession of a forged promissory note professionally from his client, a prisoner in custody for the forgery; the court refused to make an order on the attorney to produce the note, or to give a copy of it for the purpose of setting it out in the indictment, and on the trial held that he was not bound to produce it.¹ Where a notice has been given to produce a deed, but the notice cannot be proved, the attorney for the other party cannot be called upon to produce it, although he admitted a receipt of the notice. Unless a defendant has received proper notice to produce a deed, evidence that he has admitted that he had it with him is not admissible.²

A client told his attorney, who assisted him in the confession of a judgment against himself in favor of a creditor, that he did it that he might have his piano sold on execution, so his other creditors could not attach it. The court allowed the attorney to determine whether he would disclose the communication, and he refused; but as the communication was considered privileged in any event, this fact was not considered error, the result being the same.³ Instructions given by a party to his attorney, not in the presence of the opposing party, in respect to a settlement of matters in dispute, are inadmissible in behalf of the party giving them.⁴ The rule applies although the communications do not relate to litigation, and it extends equally to both parties.⁵

In a case where an attorney was regarded as attorney for both husband and wife, he was not allowed to testify as to a conversation had with the wife, it being of a professional character; an action was brought by the wife to recover possession of her separate real property from her vendee. The conversation was had with her by the attorney of the husband in relation to the

¹ *Rex v. Smith*, 1 Phill. Ev. 132; *Rex v. Dixon*, 3 Burr. 1687.

² *Doe d. Wartney v. Grey*, 1 Stark. 238; *Read v. Passer*, 1 Esp. 216; *Lanis v. Barclay*, 3 Stark. 38; *Harris v. Hill*, 1 Dowl. & R. 17; *Copeland v. Watts*, 1 Stark. 95; *Merle v. Moore*, 2 Car. & P. 275; *Hooper v. Harcourt*, 1 H. Black. 534.

³ *Maxham v. Place*, 46 Vt. 434. See also *Orton v. McCord*, 33 Wis. 205.

⁴ *Childs v. Delaney*, 1 Thomp. & C. 506.

⁵ *Carnes v. Platt*, 15 Abb. Pr. N. S. 337; S. C. 36 N. Y. Superior Court, 361; *Britton v. Lorenz*, 45 N. Y. 51.

sale of certain personal property purchased with money derived from the sale of the real estate.¹ The rule has been held to embrace a case where one seeking counsel pays no fee and employs other attorneys in the prosecution of the business, and even where the lawyer consulted is afterward employed on the other side.² And also a case where two adverse parties counseled with an attorney, and made disclosures to him, the latter was not permitted to give in evidence the declarations of either.³

In an action by an indorsee against the makers of a promissory note, an attorney called as a witness by defendant was compelled against the plaintiff's and his own objection to testify that he received a letter from the payee, containing a claim for intoxicating liquors against the defendants; that he advised his correspondent to get a promissory note on time, signed by the defendants, and to indorse it for value, before it was due, to an innocent third person; and that he afterward received the note in suit from the plaintiff. The plaintiff also produced, at the request of the defendants, but against his own objection, the letter to the attorney, which stated that the defendants owed the payee a running account for intoxicating liquors furnished to them in Wisconsin. But permitting these disclosures was held a violation of the rule excluding privileged communications.⁴

An attorney who knew, professionally, of the transfer of a promissory note, on which an action was afterward brought, was not admitted as a witness to prove the terms of the transfer.⁵ Communications made by a prisoner to his counsel in the course of professional employment, and documents placed by him in the charge of his counsel, are not admissible as evidence against him in a criminal prosecution.⁶ A communication to an attorney in reference to his client's personal estate, made upon retaining him to draw an affidavit for the purpose of procuring a reduction of the assessments of such estate, is privileged.⁷

An attorney who in his professional character has received

¹ *Scranton v. Stewart*, 52 Ind. 68. See *Lockhard v. Brodie*, 1 Tenn. Ch. 384.

² *Cross v. Riggins*, 50 Mo. 335.

³ *Hull v. Lyon*, 27 Mo. 570.

⁴ *Higbee v. Dresser*, 103 Mass. 523.

⁵ *Beltzhoover v. Blackstock*, 3 Watts. 20.

⁶ *State v. Hazleton*, 15 La. An. 72.

⁷ *Williams v. Fitch*, 18 N. Y. 546.

from the owner of property confidential communications on the subject of a transfer of it, which is subsequently made, cannot be examined, against the consent of the grantee, in relation to such communications.¹ When an attorney has received confidential communications from a partnership firm, one member of the firm cannot release him from the obligation of secrecy. It is the privilege of all; and before the attorney can properly disclose such communications he must have the consent of every member of the firm.² So where the privilege extends to several not partners, one cannot release from the obligation.³

A bill filed by the insurers of a life against the insured, to which the solicitor of the insured was a party, as a defendant, stated that on a particular day an agent of a company with whom the insured wished to effect an insurance came to the office of the insured, and told their agent that the life was bad, handing to such agent at the same time an unfavorable medical report upon the life. The defendant, the solicitor of the insured, was present at this interview; but, in his answer to the bill, refused to state what passed, because he was then the solicitor and attorney, and was present as the solicitor and attorney of the insured, and acquired his information touching the matters which he refused to answer solely from the fact of his being present at the time in the capacity of solicitor and attorney, and professional and confidential adviser of the insured. The court held that this answer was sufficient, and the information was privileged.⁴ In trover for a lease by the assignees of a bankrupt, the plea was that before the bankruptcy the bankrupt deposited the lease with the defendant as a collateral security for money which the bankrupt owed him. At the trial the plaintiffs attempted to show that the lease was deposited after the act of bankruptcy, and for that purpose called a witness, who had been the attorney for the bankrupt after the act of bankruptcy, and had been applied to by him to raise him money. It was then proposed to ask him whether the bankrupt had not the lease in his possession at that time. The court held that this was privileged from dis-

¹ *Foster v. Hall*, 12 Pick. 89.

² *People v. Barker*, 56 Ill. 299.

³ *Chahoon's Case*, 21 Gratt. 822.

⁴ *Desborough v. Rawlins*, 3 Mylne & C. 515; S. C. 2 Jur. 125.

closure, as being a confidential communication made to him relative to his character as an attorney.¹

A applied to B, an attorney, to raise money upon certain property, and enable him to obtain an abstract of the title and compare it with the original; but the money was never raised. In an ejectment, B was called upon to produce the abstract, as secondary evidence of an original deed stated therein. It was held that A's communication was confidential, and that B's evidence was therefore inadmissible.² An attorney is not obliged to give evidence of a charge of forgery against his client.³

An attorney is not bound to speak as to the particulars of a bill of exchange, when the knowledge of those particulars is only derived from the bill having been intrusted to him by his client.⁴ In an action by payee against maker of a promissory note for money lent, the plaintiff, for the purpose of taking the case out of the Statute of Limitations, tendered an account-book, containing an admission by the defendant of payment of interest to him. The defendant's counsel then raised a collateral issue as to the admissibility of the book, and proved that the plaintiff, being the attorney of the defendant, wrote to her for a statement of the debts and payments of her late husband, adding: "This from you will assist me in preparing the case for counsel." Whereupon the book in question was sent to the plaintiff. It was held that the communication was privileged.⁵ Communications made to an attorney by his client respecting the sale of estates are privileged; the rule is not limited to suits existing or expected. The privilege of communication between solicitor and client extends to all matters within the scope of the ordinary duties of a solicitor, and the sale of estates being of such matters, a solicitor is not at liberty to disclose what passed in conversations which he had, either with the client or the agent of the client, relative to the amount of the bidding to be reserved upon the sale of an estate in which he had been concerned for him, or to other matters connected with such sale.⁶

¹ *Turquand v. Knight*, 2 Mees. & W. 98; 2 Gale & D. 192.

² *Peters v. Watkins*, 4 Scott, 155; 3 Bing. N. C. 421; 3 Hodges, 25; 1 Jur. 42.

³ *Rex v. Dixon*, 3 Burr. 1687.

⁴ *Beard v. Ackerman*, 5 Esp. 120; 4 Esp. 235; 5 Esp. 52.

⁵ *Cleave v. Jones*, 7 Ex. 421; 21 Law J. Ex. 105.

⁶ *Mynn v. Joliffe*, 1 Moody & R. 326; *Carpmael v. Powis*, 1 Ph. 687; 15 Law J. Ch. 275.

An attorney cannot be permitted to testify that his client told him before action brought that he intended to waive a forfeiture on which the action is sought to be maintained.¹ It makes no difference in regard to the rule as to privileged communications, that the client is no party to the cause before the court. Thus, upon an indictment for breaking open the house of the prosecutor and assaulting his person, the attorney cannot give in evidence a communication made to him by the prosecutor, while consulting him professionally upon the subject, although such communication be materially at variance with the evidence given by the prosecutor in the witness-box; nor disclose what passed at the time between them and a third person in regard to the proprietorship of the house in which the offense was committed, although such third person was no party to the pending prosecution.²

An attorney who, being resorted to by a borrower to raise money for him, peruses, on the part of the proposed lender, the abstracts of the borrower, is not allowed to give evidence concerning them against the borrower;³ and an attorney employed by consent of two parties in preparing a deed from one to the other, cannot be examined as to what he so became informed of in the preparing of the deed, when the action is brought by the assignees of one against the other, suggesting fraud in the deed.⁴ But the privilege attaches to such communications only as are made by each party to the attorney in the character of his own professional adviser. Thus, where the same attorney was acting both for the vendor and purchaser of an estate, a communication from the latter, asking for time to pay the purchase-money, was held not to be privileged, as being made to him in his character of attorney for the vendor.⁵

A claimant who deposed that "obstacles having arisen in granting a second lease, one only was granted," was asked, on cross-examination, whether the obstacles were suggested by him

¹ *Goodlight v. Bridge*, Lofft, 27.

² *Rex v. Withers*, 2 Camp. 578.

³ *Peter v. Watkins*, 3 N. C. 421; *Taylor v. Blacklow*, Ibid. 235.

⁴ *Robson v. Kemp*, 4 Esp. 235; 5 Esp. 52. But see *Warde v. Warde*, 5 Eng. L. & Eq. 217; *Hawkins v. Gathercole*, 2 Ibid. 100.

⁵ *Perry v. Smith*, 9 Mees. & W. 681; *Braughe v. Cradock*, 1 Moody & R. 182; *Cleeve v. Powell*, Ibid. 228; *Shore v. Bedford*, 5 Man. & G. 271.

to his solicitor, or by his solicitor to him, and was held not bound to answer; and a bill of costs delivered in the same matter was also held to be privileged.¹

§ 151. Communications held not privileged.—In an action by an officer on an agreement to indemnify him for making an attachment, the facts that the defendant directed his attorney to make the attachment, and that, upon being asked for a bond of indemnity, he consulted his attorney, and was told by him that if he directed the attachment to be made, or agreed to indemnify the officer, he would be liable, whether he signed the bond or not, are not privileged.²

An attorney is not privileged from disclosing by whom he was employed in the management of a cause, and that he was instructed by one person to follow the directions of another in the prosecution of the business, although the knowledge was acquired by confidential consultations as counsel and clients.³ An attorney is not privileged from disclosing the name of his client in any particular suit, that not being matter of professional confidence; but he cannot be compelled to testify as to the situation of an instrument, at the time it was committed to him, for the purpose of having a suit instituted upon that instrument.⁴

Counsel of defendant may be called to prove whether a signature on a note in suit is that of the defendant, if he is not required to disclose any matter of confidential communication, or to base his opinion upon any statement of the defendant.⁵

Upon the trial of one indicted for perjury in falsely swearing respecting the existence of a partnership, it was held that the attorney whom he had consulted respecting the partnership might be asked what advice he gave the defendant in the matter about which he was charged to have sworn falsely.⁶ A conversation with a lawyer about matters concerning which it was probable there would be litigation, but where there was no retainer,

¹ *Turton v. Barber*, Law R. 17 Eq. 329; 7 Moak Eng. R. 852, approving *Minet v. Morgan*, Law R. 8 Ch. 366, 367.

² *Day v. Moore*, 13 Gray, 522.

³ *Gower v. Emery*, 18 Me. 79.

⁴ *Brown v. Payson*, 6 N. H. 443.

⁵ *Brown v. Jewett*, 120 Mass. 215.

⁶ *State v. McKinney*, 42 Iowa, 205.

nor anything showing that the advice was sought to regulate future conduct, has been admitted in evidence.¹

Plaintiff's attorney, as a witness, was questioned by defendant as to who owned the note when he, the attorney, sold it to the plaintiff, and the witness was held bound to answer the question, as it did not call for facts communicated to him by the plaintiff; and this, although the payee had formerly been his client, since the latter did not appear as a party in interest in the action. The question whether the witness had ever advanced any money to any person on the note, did not call for an answer which could have been the subject of a privileged communication.² What a mortgagor in treaty to raise money says to the attorney of the mortgagee is not privileged.³

It is said that whether a communication by a client to his attorney was made in confidence is a question of fact, to be disposed of by the court. If the attorney, while managing a suit for the client, receives a deed of the client's property without consideration, and then, at the client's request, deeds the property to another person without consideration, these facts are not privileged communications, and the attorney may be required to disclose them as a witness in a suit by a creditor to cancel the deeds. If, pending the relation of client and attorney, the client communicates to the attorney a fact foreign to the object for which the attorney was retained, the communication is not confidential. If an attorney is retained in an action, and the client after final judgment makes disclosures respecting the subject of the employment, the communications are not privileged.⁴

The rule does not extend so far as to prohibit the attorney from stating by whom and when he was employed, and in what capacity. Neither does the rule prevent the attorney from testifying to communications made to him by his client, unless they are confidential communications, made by the client in the course

¹ *Thompson v. Kilborne*, 28 Vt. 750.

² *DeWitt v. Perkins*, 22 Wis. 473.

³ *Masters v. Downes*, 4 Nev. & M. 861; 1 Ad. & E. 31; 3 Car. & P. 381.

A took a forged will to B, a solicitor, and asked him to advance money on a mortgage of the property mentioned in the will. B made no charge for the interview, and did not advance the money. Held, not a privileged communication. (*Reg. v. Farley*, 1 Den. C. C. 197; 2 Car. & K. 313.)

⁴ *Hager v. Shindler*, 29 Cal. 47.

and for the purposes of the employment of the attorney. The appellate court will not reverse a judgment because the lower court admitted testimony of the attorney as to communications made to him by his client, if the only objection made at the trial was that it was irrelevant and immaterial.¹

An attorney may be called on to testify to a collateral fact within his knowledge, or to a fact which he might know without being intrusted with it by his client; as where an attorney after the commencement of a suit, without any communication from his client, acquires a knowledge of his handwriting, he may be questioned as to its identity.² The testimony of a person employed by a mortgagee, as his attorney and legal adviser at the time of taking a mortgage, in respect to the terms of the bargain between the mortgagor and mortgagee upon which the bond and mortgage were executed, is not liable to the objection that the bargain so made was in the nature of a privileged communication.³ The testimony of an attorney, that he brought suit for a certain firm, recovered judgment, collected the money, and paid it over to a party, to whom one of the firm, by letter and assignment, directed him to pay it, is admissible, and not privileged.⁴ Evidence as to collateral facts is not privileged, or that the clients expressed themselves satisfied with a new security.⁵ An attorney employed in a cause may, when it is *prima facie* relevant, be examined as to the amount of his fee, and the terms on which it is to be paid.⁶ An attorney may be compelled to answer whether the party he represents is fictitious,⁷ and as to who was his client, and when the relationship commenced and ended, and what money was received, and what paid over and to whom paid, and through whose agency, or in what manner, or at what time he was retained.⁸

Statements made by the client to other persons than the attor-

¹ *Satterlee v. Bliss*, 36 Cal. 489; *Chirac v. Reinicker*, 11 Wheat. 280; *Gower v. Emery*, 18 Me. 82; *Brown v. Payson*, 6 N. H. 448; *Beckwith v. Benner*, 6 Car. & P. 681.

² *Johnson v. Daverne*, 19 Johns. *134; *Brant v. Kline*, 17 Ibid. 338; 4 T. R. 331.

³ *Prouty v. Eaton*, 41 Barb. 409.

⁴ *Fulton v. Maccracken*, 18 Md. 528.

⁵ *Heister v. Davis*, 3 Yeates, 4; *Rogers v. Dare*, Wright, 136.

⁶ *Smithwick v. Evans*, 24 Ga. 461.

⁷ *Martin v. Anderson*, 21 Ga. 301.

Shaughnessy v. Fogg, 15 La. An. 330.

ney, or by other persons to him, are not privileged, and the attorney is bound to disclose them the same as any other witness. The rule does not extend to any facts within the attorney's knowledge, or information acquired by him in any other way than by such confidential communications of the client.¹ When an attorney has an interest in the facts communicated to him, and their disclosure becomes necessary to protect his own personal rights, he must be exempt from the obligation of secrecy.² A communication made to an attorney by a person seeking professional advice or assistance to enable him to forge a contract, is not privileged.³

An attorney has been compelled to testify that, in collecting a claim his client had assigned, he acted on behalf of such client, and that the latter forbade him to pay over the proceeds to the assignee.⁴ An attorney must testify how he obtained possession of a paper which is the basis of his client's suit.⁵ Where clients authorize an attorney at law to make a certain contract with a party, which is done, and the contract is carried out as per agreement, the authority thus given is not a confidential communication by the clients, and the attorney may prove the contract.⁶

From copies of letters written before the litigation, by a plaintiff to one of the defendants, it appeared that the former had taken opinions of counsel and the friendly opinion of an ex-chancellor on points which afterward became part of the subject-matter of the litigation. Plaintiff, in answer to an application to produce these opinions, and the cases on which they were founded, objected, on the ground that they were written in anticipation of, and in relation to, the litigation; but he was compelled to produce both classes of documents for inspection.⁷

The rule does not apply when the client sues the attorney for disobeying instructions alleged to have been given in consulta-

¹ *Gallagher v. Williamson*, 23 Cal. 331; *Bank v. French's Executrix*, 1 Cranch C. C. 221; *Hunter v. Watson*, 12 Cal. 377; *Bogert v. Bogert*, 2 Edw. Ch. 399; *Rochester Bank v. Suydam*, 5 How. Pr. 254; *Marsh v. Howe*, 36 Barb. 649; *Hatton v. Robinson*, 14 Pick. 416; *Bramwell v. Lucas*, 2 Barn. & C. 745.

² *Rochester Bank v. Suydam*, *supra*.

³ *People v. Blakeley*, 4 Parker, Cr. C. 176.

⁴ *Mulford v. Muller*, 3 Abb. N. Y. App. 330.

⁵ *Allen v. Root*, 39 Tex. 589.

⁶ *Burnside v. Terry*, 51 Ga. 186.

⁷ *Smith v. Daniell*, Law Reports, 18 Equity, 649.

tions, and for unskillfully managing a cause, upon information given by the client in them.¹ Communications made to one who was receiving business as an attorney, but was not one in fact, though he expected to be, and was actually admitted at the next term of court, were considered not privileged.² An attorney may state by whom he was employed. Where an attorney stated that he did not know that he had ever talked with the party about his business, his testimony was allowed.³ Communications made by a party to one who usually acted as his attorney, but who, at the time the statements were made, was acting as attorney for other persons, have been deemed not privileged.⁴

Counsel may be examined as to the mere fact of the existence of the professional relation; but where the question went further, and asked, not only whether the witnesses were employed, but whether they were employed by the client to conduct an ejectment for him *as landlord of the premises*, the question in this form was held to involve a disclosure of confidential communications. It sought a disclosure of the title and claim set up by the client to his counsel for the purpose of conducting the cause. It was virtually seeking a disclosure as to the nature, extent, and grounds of the client's title.⁵ A communication should be made under cover of an employment strictly professional, and should be such as the business to be done required to be made; it should also be of a confidential nature, and so considered at the time, and should be shown to have been made with direct reference to the professional business. When the attorney has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights, he must be exempted from the obligation of secrecy.⁶

A fraudulent grantee of real estate inquired of an attorney whether he could give a mortgage on the land so as to prevent

¹ *Nave v. Baird*, 12 Ind. 318.

² *Sample v. Frost*, 10 Iowa, 266.

³ *Satterlee v. Bliss*, 36 Cal. 490.

⁴ *Wilson v. Godlove*, 34 Mo. 337.

⁵ Per Story, J.—*Chirac v. Reinicker*, 11 Wheat. 294.

⁶ *Rochester Bank v. Snyder*, 5 How. Pr. 254. The principle just enunciated in this case is probably sound. There are *dicta*, however, in the opinion of Selden, J., in favor of restricting the rule to cases pending or anticipated, which are not in consonance with the weight of authority. See ante, §§ 143-4.

his grantor from getting it back. The attorney advised him not to give a mortgage; but, if anything, to give a deed. The attorney, by his directions, drew a deed of the land to a third person; and at the time of its execution, and afterward, conversations between the parties to the deed were had in his presence, showing that it was given and received in bad faith. The attorney was not retained generally for either of the parties to the deed, and had previously been employed to draw writings for each of them, and had sometimes been consulted by the grantor; but had only once been paid by him for counsel, and had at the time a small professional account against the grantor; but was not paid for the advice in regard to the deed referred to, and did not charge or expect anything for it; though nothing was said at the time to indicate whether the grantor expected to pay for it or not. As the parties left the attorney, after one of the conversations, one of them told him that he could not say anything about it, as he was "an attorney," or "their attorney." The court held that in a suit by the owner of the land to set aside the deed, that the attorney was competent to testify to the advice and conversations referred to, although the parties to the deed objected to the disclosure as a breach of confidence.¹

Where an act is done in pursuance of a bargain between two parties, and in presence of the attorneys for each of them, the communication by one party to his attorney, relating to that act, is not privileged so as to prevent the attorney from giving evidence of it.² Where, upon the sale of an estate, the same attorney was employed by the vendor and by the purchaser, a communication from the purchaser to the attorney, asking for time to pay the purchase-money, is not privileged.³ The rule does not extend to facts of which the counsel or attorneys themselves obtain knowledge in the course of a trial, and from other sources than the client,⁴ or from third parties,⁵ whether strangers to

¹ *Dunn v. Amos*, 14 Wis. 106. The rule applies to the case where two persons, having hostile interests, consult the same attorney at the same time, with respect to the matters in dispute, and one of such parties calls upon the attorney to testify with respect to the declarations and admissions made by the other at the consultation. Whether a communication is privileged or not, is a question for the court. (*Hull v. Lyon*, 27 Mo. 570.)

² *Weeks v. Argent*, 16 Mees. & W. 817; 11 Jur. 525; 16 Law J. Ex. 209.

³ *Perry v. Smith*, 9 Mees. & W. 681; Car. & M. 554.

⁴ *Brown v. Foster*, 1 Hurl. & N. 736; 3 Jur. N. S. 245; 26 Law J. Ex. 249.

⁵ *Ford v. Tennant*, 9 Jur. N. S. 292; 32 Law J. Ch. 465; 11 Week. R. 324; 7 L. T. N. S. 732; 32 Beav. 162.

or the opponents of the client, although made to the solicitor while acting in that capacity. A judge must decide the preliminary question whether a communication is privileged or not; and this decision is subject to review.¹

An attorney may be required to disclose by whom he was employed,² and he may disclose terms of compromise offered by him to his client's creditors,³ and he may be examined as to the handwriting of his client, if a knowledge thereof is acquired without any communication from him.⁴ An attorney who draws up a will is competent to testify as to its contents in order to set it up as a lost will,⁵ and he may be required to disclose collateral facts, as that a bond was lodged with the client by way of indemnity, or that he expressed himself satisfied with certain security.⁶ Where the attorney and client both engage in committing a wrongful act, the former cannot refuse to disclose the facts of the transaction on the ground that his knowledge thereof resulted from the relation of attorney and client.⁷

A communication made by a client to his attorney to obtain information as to a matter of fact, and not for the purpose of asking him his legal advice, is not privileged; where, therefore, a trader, at the suggestion of his attorney, called a meeting of his creditors, to be held at a given time and place, and on the morning of that day went to the attorney's office, and inquired of him whether he could safely attend the meeting without being arrested for debt, and the attorney having advised him to remain at the office until it was ascertained whether the creditors would engage to give him a safe conduct, the trader remained at the office accordingly for upward of two hours to avoid being arrested by some one of his creditors, until after the attorney had attended at and returned from the meeting, it was held that what passed between the attorney and the trader was admissible in evidence, and might be disclosed by the attorney on

¹ *Cleave v. Jones*, 7 Ex. 421; 21 Law J. Ex. 105.

² *Martin v. Anderson*, 21 Ga. 301; *Brown v. Payson*, 6 N. H. 443; *Satterlee v. Bliss*, 36 Cal. 489; *Gower v. Emory*, 18 Me. 79.

³ *M'Tavish v. Dunning*, Anth. 82, 113.

⁴ *Johnson v. Daverne*, 19 Johns. 134.

⁵ *Graham v. O'Fallon*, 4 Mo. 338.

⁶ *Heister v. Davis*, 3 Yeates, 4.

⁷ *Dudley v. Beck*, 3 Wis. 274.

his being called as a witness in a cause where the question was, whether the trader had committed an act of bankruptcy on that occasion.¹

The attorney conducting a cause in court may be called as a witness by the opposite side, and asked who employs him, in order to show the real party and let in his declarations.² To prove the identity of the defendants the clerk of their solicitor is a competent witness to that fact, though he knows nothing of the defendants but from his intercourse with them professionally in conducting a suit in chancery.³ An attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client.⁴ The court will not permit an attorney to allege that his client told him before an action brought that he intended to waive a forfeiture on which he supports his action. Where two parties in dispute have one attorney, a communication by one to him in his common capacity may be used by the other.⁵ A plaintiff may call the former attorney of the defendant, to prove an offer by him, on the part of his client, to settle an account, and to pay a sum of money as due to the client.⁶ As the rule extends only to cases where attorneys act in their professional capacity, they may be examined like any other witnesses as to facts, and collateral matters with which they became acquainted before they were addressed in their professional character,⁷ or where they have made themselves parties to the transaction, or which they must have known without being intrusted with the cause.⁸ Thus, an attorney who prepared deeds which were granted on an usurious consideration was compelled to testify in order to prove the usury.⁹

An attorney may be compelled to prove that his client signed and verified an answer, upon which the client has been indicted

¹ *Bramwell v. Lucas*, 4 Dowl. & R. 367; 4 Barn. & C. 745.

² *Levy v. Pope*, Moody & M. 410.

³ *Studdy v. Sanders*, 3 Dowl. & R. 347.

⁴ *Spenceley v. Schulenberg*, 7 East, 357; 3 Smith, 325.

⁵ *Baugh v. Crodocke*, 1 Moody & R. 182; *Cleeve v. Powell*, 1 Ibid. 228.

⁶ *Turner v. Raylton*, 2 Esp. 474.

⁷ ——— *v.* ———, 1 Vent. 197; 10 Mod. 40; 4 Durn. & E. 759.

⁸ *Duffin v. Smith*, Peake, 108; 5 Esp. 52; Bull. N. P. 284.

⁹ *Duffin v. Smith*, Peake, 108.

for perjury.¹ So, a knowledge of a client's handwriting, obtained by his attorney from having witnessed his execution of the bail-bond in the action, is not a privileged communication, when the attorney is called on the part of the plaintiff, to prove the defendant's handwriting, on the trial.² It seems that a letter written by an attorney to his client, and produced with the client's signature indorsed upon it, is evidence against the client.³

A prisoner was indicted for forging a will. The forged instrument had been given by him to his attorney, ostensibly for professional purposes, but in the opinion of the judge, with some very different object. An objection that it was a privileged communication and could not be read was overruled.⁴

A, being charged with embezzlement, retains B, a barrister, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of B's employment. This being a fact observed by B, in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action by A against the prosecutor in the original case for malicious prosecution.⁵

§ 152. Disclosures allowed for protection of attorney.—

Although an attorney cannot, without the consent of his client, be compelled, and has no right, to disclose any fact which may have been communicated to him by his client solely for the purpose of obtaining his professional assistance or advice, still this rule is not to be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. In litigation between attorney and client, if the disclosure of a privileged communication becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, dis-

¹ *Doe d. Jupp v. Andrews*, Cowp. 845.

² *Hurd v. Moring*, 1 Car. & P. 372.

³ *Meyer's Assignees v. Sexton*, 2 Stark. 274.

⁴ *Reg v. Jones*, 1 Den. C. C. 166; 2 Car. & K. 234.

⁵ *Brown v. Foster*, 1 Hurl. & N. 736; Wharton on Evidence, sec. 577, note '3.

close more than is necessary for his own protection. For instance, if a client makes a private and confidential statement of facts by letter to an attorney employed to conduct a suit, inducing him to take a particular course with the suit, which proves eminently disastrous, and he is afterward prosecuted by his client for unskillful management of the cause, it would seem that he ought to be able to produce the letter in his justification.¹

§ 153. Professional employment necessary. — The true principle in reference to privileged communications between attorney and client is that, where the attorney is professionally employed, any communication made to him by his client, with reference to the object or the subject of such employment, is under the seal of professional confidence, and is entitled to protection as a privileged communication. Such appears to be now the settled rule of the courts of England; although, as we have seen, it was at one time attempted to confine the privileges to communications made in the prosecution or defense of a suit which had been, or was about to be, commenced.² But, to set the privilege in operation, the professional relation must exist, and some kind of professional employment is necessary.³

Knowledge of the matter must be acquired by reason of the relation, not merely during its existence, and knowledge acquired from a plaintiff, during the existence of the relation of attorney and client between the attorney and defendant, will not prevent the attorney from testifying against the plaintiff.⁴ So where the attorney is consulted merely as a friend and not in a professional character, and neither the attorney nor the person consulting

¹ *Mitchell v. Bromberger*, 2 Nev. 345; *Rochester Bank v. Suydam*, 5 How. Pr. 254; *Ware v. Baird*, 12 Ind. 318.

² *Bank of Utica v. Mersereau*, 3 Barb. Ch. 595, per Walworth, Chancellor; *Cromack v. Heathcote*, 2 Brod. & B. 4; *Greenough v. Gaskell*, 1 Mylne & K. 98; *Herring v. Cloberry*, 1 Phill. 91; *Coveney v. Tannehill*, 1 Hill, 33; *Parker v. Carter*, 4 Munf. 273.

³ *Granger v. Warrington*, 8 Ill. 299; *Gillard v. Bates*, 6 Mees. & W. 547; *Rex v. Brewer*, 6 Car. & P. 363; *Hill v. Elliott*, 5 Ibid. 436; *Farquand v. Knight*, 2 Mees. & W. 100; *Annesley v. Anglesea*, 17 How. St. Tr. 1221; *Bramwell v. Lucas*, 4 Dowl. & R. 367; 2 Barn. & C. 745; *Bogert v. Bogert*, 2 Edw. Ch. 399; *Rogers v. Dare*, 1 Wright, 136.

⁴ *Thompson v. Wilson*, 29 Ga. 539; *Chappell v. Smith*, 17 Ga. 68; *Montgomery v. Morris*, 32 Ga. 173; *McDougald v. Lane*, 18 Ga. 444.

supposes the professional relation to exist between them.¹ So where no legal advice is asked or given.² So as to a communication voluntarily made to counsel after he has refused to be employed by the party making it.³

A communication, then, is not privileged unless the person to whom it is made is acting for the time being in the character of legal adviser of the person who makes it. The communication must also be made for the purpose of obtaining professional advice or aid in the matter to which the communication relates.⁴ Communications as to facts of a suit, made to the attorney therein by one who is a nominal party but has no interest in the suit, are not privileged from being disclosed in evidence.⁵

§ 154. Formal-retainer not necessary.—While the professional relation must exist, and some kind of professional employment is necessary, still a former retainer is not necessary to constitute a relation whose communications the law will treat as inviolable.⁶ It is enough to enable the protection of the law to apply, that a legal adviser is sought for the purpose of confidential professional advice, with a view, either to the prosecution of a claim or a defense against a claim.⁷

The protection has been even held to reach cases in which a

¹ *Goltra v. Wallcott*, 14 Ill. 89; *Borum v. Fouts*, 15 Ind. 50; *Hoffman v. Smith*, 1 Caines, 157; *Thompson v. Kilborne*, 28 Vt. 750.

² *De Wolf v. Strader*, 26 Ill. 225; *Hatton v. Robinson*, 14 Pick. 416.

³ *Setzer v. Wilson*, 4 Ired. 501.

⁴ *Chew v. The Bank*, 2 Md. Ch. 231; *Alderman v. People*, 4 Mich. 414; *Milan v. State*, 24 Ark. 346; *Pierson v. Steortz*, 1 Morris, 136; *Rogers v. Dare*, Wright, 136; *Beeson v. Beeson*, 9 Pa. 279; *Brandon v. Gowing*, 7 Rich. 459; *Flack's Admr. v. Neill*, 26 Tex. 273.

⁵ *Allen, Adams & Co. v. Harrison*, 30 Vt. 219.

To charge a counsellor at law with offering himself as a witness, in order to divulge the secrets of his client, is libelous, and it is not a sufficient justification that he disclosed matters communicated to him by his client, which had no relation or pertinency to the cause in which he was engaged. (*Riggs v. Denniston*, 3 Johns. Cas. 198.)

⁶ *Wharton on Evidence*, sec. 578; *Ross v. Gibbs*, Law R. 8 Eq. 522; *Foster v. Hall*, 12 Pick. 89; *Beltzhoover v. Blackstock*, 3 Watts, 20.

⁷ *Ross v. Gibbs*, Law R. 8 Eq. 522; *Wilson v. Railroad*, Law R. 14 Eq. 477; *Minet v. Morgan*, Law R. 8 Ch. 361; *Sargent v. Hampden*, 38 Me. 581; *March v. Ludlam*, 3 Sand. Ch. 35. But see *Wilson v. Rastall*, 4 Tern Rep. 753.

Communications by a married woman to her husband's attorney are privileged. (*Scranton v. Stewart*, 52 Ind. 68.)

person has been consulted, under the belief that he was a professional lawyer, which he really was not;¹ and also to cases where the communications were made under the erroneous belief that the party consulted had consented to act as counsel.²

An attorney, however, has been compelled to testify as to non-confidential statements made to him, before retainer, by one who afterward became his client.³ An injunction of secrecy is not necessary to protect the communications.⁴ The law will presume, if necessary, that the injunction was given.

§ 155. Mode of imparting privileged information.—The mode in which the information is communicated—whether by an oral statement of facts, or by delivering a written instrument—is not important. The principle is the same, in whatever way the information passes. The policy of the law allows a man to make the best defense in his power. Whatever may be his delinquency, he is permitted to confer freely with his counsel, and to place in his hands any paper touching the matter in question without the peril of having his confidence betrayed under the forms of law. The attorney may be called to prove the existence of a paper, and that it is in his possession for the purpose of enabling the other party to give parol evidence of its contents. But he cannot be compelled to produce or disclose the contents of a paper which has been deposited with him by his client. In one case, Lord Mansfield said that instead of producing the paper and obeying a subpœna *duces tecum*, the attorney ought, immediately upon receiving the subpœna, to have delivered the papers up to his client.⁵

§ 156. Effect of the client's calling the attorney as a witness.—A party who testifies himself and who calls as a witness one who has been his legal counsel, and who is not exam-

¹ Calley v. Richards, 19 Beav. 401. *Contra*, In re Bellis, 3 Ben. 386; Sample v. Frost, 10 Iowa, 266.

² Smith v. Fell, 2 Curt. 667.

³ Cutts v. Pickering, 1 Vent. 197.

⁴ Wheeler v. Hill, 16 Me. 329.

⁵ Coveney v. Tannahill, 1 Hill, 33; Brandt v. Klien, 17 John. 335; Jackson v. McVey, 18 John. 330; Rex v. Smith, 1 Phil. Ev. 142; Baird v. Ackerman, 5 Esp. 119. See Bevan v. Waters, 1 Moody & M. 325; Eicke v. Nokes, Ibid. 303; Durkee v. Leland, 4 Vt. 612; Wright v. Mayer, 6 Ves. 280; Rex v. Dixon, 3 Burr. 1687.

ined or cross-examined as to conversations with his client, may object, when the counsel is called as a witness by the other party, to his testifying in regard to such communications. So where the attorney so called in chief was not then asked as to his communications with his client, but he was cross-examined by the defendant's counsel as to all matters of fact which came to the client's knowledge before the execution of the deed—and after the evidence was all in, the attorney was recalled and asked by the defendants what conversations he had as counsel with the plaintiff in reference to making the deed and giving the receipt, and for what reason he advised the delivery of the deed—it was ruled that what passed between counsel and client was not admissible, and the evidence was excluded, although it was contended that the exclusion of the evidence offered was a privilege which the client might waive, and that it was waived by the client's becoming a witness. This alone, it was held, did not amount to a waiver.¹

§ 157. Cross-examination of attorneys.—But where a party calls his solicitor as a witness to the communication, the other side may cross-examine on the particular point as to which he was examined in chief, but not as to others concerning which he did not testify.² An attorney may be compelled on cross-examination by interrogatories to produce letters relating to the subject-matter, if he does not state that they are confidential.³

The court refused to restrain a discharged attorney from giving evidence before another court, leaving it to the latter to decide whether the evidence was the subject of confidential communication, and therefore protected.⁴ The attorney who desires to demur to interrogatories on the ground that an answer would divulge the secrets of his client, must do so in writing, and formally; a mere statement to that effect, in answer to the interrogatory, seems not to be sufficient. Such a statement is, however, an answer under oath, and if false, an indictment for perjury might be sustained on it.⁵

¹ *Montgomery v. Pickering*, 116 Mass. 227.

² *Vailliant v. Dodemead*, 2 Atk. 524; *Crittenden v. Strother*, 2 Cranch C. C. 464.

³ *Atkinson v. Atkinson*, 2 Adams, 469.

⁴ *Beer v. Ward*, 1 Jacob, 77.

⁵ *Morgan v. Shaw*, 4 Mod. 54.

"A party who offers himself as a witness, and undertakes to answer certain interrogatories, cannot, it has been ruled, refuse to answer pertinent cross-questions on the ground that they touch confidential communications from himself to his counsel. It is otherwise, however, when the witness has not waived his privilege by a partial answer involving the subject-matter of his communications."¹

At the common law, the party was neither competent nor compellable to testify; hence, such communications were effectually locked at the common law, and could not be revealed at all. While a statute may make parties both competent and compellable to give evidence, it should not be construed to open the door to a full inquiry into privileged communications. Counsel can set up the privilege notwithstanding the statute.²

§ 158. A lawyer making himself attesting witness loses his privilege—that is to say, when the client obtains the lawyer's signature as an attesting witness to an instrument executed by the client, the lawyer is compelled to prove his signature, his privilege in this respect as a professional man yielding to "his duties as a witness."³ But the surrender is limited to the mere act of attestation; and an attorney who has signed as attesting witness a deed whose *bona fides* is contested, though he may be asked as to the attestation, is still privileged as to any information derived by him from his client as to the concoction of the instrument.⁴

¹ Wharton on Evidence, sec. 479; *Woburn v. Henshaw*, 101 Mass. 193, affirming *Commonwealth v. Mullen*, 97 Ibid. 545; *Montgomery v. Pickering*, 116 Mass. 229.

² *Barker v. Kuhn*, 38 Iowa, 395; *Brand v. Brand*, 39 How. Pr. 193.

³ Wharton on Evidence, sec. 592; *Sandford v. Remington*, 2 Ves. 189; *Doe v. Andrews*, 2 Cowp. 845; *Robson v. Kemp*, 5 Esp. 53.

⁴ *Wheatley v. Williams*, 1 Mees. & W. 533; *Turquand v. Knight*, 2 Ibid. 98. It is said that agents, not lawyers employed to collect testimony in preparation for a trial, are privileged; and so are communications between a party or his legal adviser and witnesses, and so communications between the parties, with regard to the preparation of evidence, are also privileged. Wharton on Evidence, sec. 593; *Preston v. Carr*, 1 Younge & J. 175; *Goss v. Gibbs*, Law R. 8 Eq. 522; *Hare on Disc.* 2nd ed. 1876, 151, 152; *Curling v. Perring*, 2 Mylne & K. 380; *Story v. Lennox*, 1 Mylne & C. 525; *Llewellyn v. Boddeley*, 1 Hare. 527; *Lafone v. Company*, 4 Kay & J. 34; *Gandee v. Stansfield*, 4 De Gex & J. 1; *Daw v. Eley*, 2 Hem. & M. 725; *Phillips v. Routh*, Law R. 7 C. P. 289; *Wilson v. Railroad*, Law R. 14 Eq. 477; *Hamilton v. Nott*, Law R. 16 Eq. 112; *Allen v. Royden*, 43

§ 159. Effect of presence of both parties.—The statements of parties made in the presence of each other may be given in evidence by attorneys, because such statements are not in their nature confidential, and cannot be regarded as privileged. And a communication made to an attorney by two persons, for whom he was counsel, in a controversy with a third person, has been allowed to be testified to by the attorney, in a contest between those two for whom he was counsel.¹ The reason of the general rule does not apply to such a case, because the attorney is then under equal obligation to both.

Where two contracting parties employ an attorney to draw up their contract, and make their communications to him in the presence of each other, each thereby waives, as against the other, his right to treat those communications as confidential, and each is entitled, in asserting his rights under the contract, to a disclosure of its stipulations from the attorney.²

The exception that communications made in the presence of all the parties to the controversy are not privileged includes a case where the communications were made by the plaintiff's assignor, in trust for creditors, in the presence of the defendant, to the attorney employed to draw the papers between them.³

§ 160. To whom the privilege extends.—As a general rule, the privilege from testifying to facts confidentially communicated to the witness is confined to professional men, when acting in their professional capacity, and does not extend to confidential communications made to others in the way of business; and the privilege does not even extend to all disclosures made by a client to his attorney, but is limited to those which are made in professional business, pending the relation of counsel and client.⁴ Thus, if one party goes to another, who is neither an at-

Law J. C. P. 206. But there are intimations in England that agents have no such privilege. (*Glyn v. Caulfield*, 3 Macn. & G. 463; *Goodall v. Little*, 1 Simons, New Series, 135; *Raynor v. Ritson*, 6 Best & Smith, 888; *Colman v. Truman*, 3 Hurl. & N. 871.)

¹ *Rice v. Rice*, 14 B. Mon. 417.

² *Parish v. Gates*, 29 Ala. 254; *Warde v. Warde*, 5 Eng. L. & Eq. 217; *Whiting v. Barney*, 30 N. Y. 330.

³ *Britton v. Lorenz*, 45 N. Y. 51.

⁴ *Dixon v. Parmelee*, 2 Vt. 185; *Wilson v. Rastall*, 4 T. R. 753.

torney nor pretends to be one, to ask him to make a conveyance of property, and that other writes to a relation of his who is an attorney, and on receiving an answer informs the party that he cannot convey, this is not a privileged communication.¹ So, with a person to whom a party, supposing him to be an attorney, makes confidential communications respecting his cause, he is bound to give evidence of them, if called as a witness.² But it has been held that the agent of an attorney cannot be examined as to communications with the client on the subject of the action, in order to prove his identity.³ The privilege of not disclosing communications between attorney and client belongs to the client and his representatives, as against third parties, but does not belong to the representatives *inter se*.⁴ A communication made to an unprofessional person, merely employed to assist another at a trial, is not privileged, nor communications made to a third party generally, even though they are made to an attorney in the presence of a third party. The third party must testify.⁵

Counsel consulted as to family or other arrangements, without reference to litigation, are placed under the restriction,⁶ and cannot be compelled to testify. The attorney may be required to disclose facts which he learned from other sources than his client;⁷ so the attorney is bound to testify, like any other witness, to statements made by the client to other persons, or by other persons to the client, or to each other, in his presence.⁸

§ 161. Privilege includes clerks, interpreters, and sometimes conveyancers.—It is laid down that whoever actually represents a lawyer in conference or correspondence with the client, is under the same protection as the lawyer himself:⁹

¹ Pritchard v. Roe, 8 Car. & P. 99.

² Fountain v. Young, 6 Esp. 113. See Shore v. Bedford, 5 Man. & G. 271.

³ Parkins v. Hawkshaw, 2 Stark. 239.

⁴ Gresley v. Mousley, 2 Kay & J. 288; 2 Jur. N. S. 156.

⁵ Brayton v. Chase, 3 Wis. 456.

⁶ Rex v. Withers, 2 Camp. 578; Walsingham v. Goodricke, 3 Hare, 124; Desborough v. Rawlins, 3 Mylne & C. 515; Carpmael v. Powis, 9 Beav. 16, overruling Williams v. Mudie, 1 Car. & P. 158, and Clark v. Clark, 1 Moody & R. 3; Wadsworth v. Hanshaw, 2 Brod. & B. 5.

⁷ Bogert v. Bogert, 2 Edw. Ch. 399; Hunter v. Watson, 12 Cal. 363; Rogers v. Dare, Wright, 1 Ohio, 136; Chirac v. Reinicker, 11 Wheat. 280.

⁸ Gallagher v. Williamson, 23 Cal. 331.

⁹ Parker v. Hawkshaw, 2 Stark. 239; Du Barre v. Livette, Peake R. 77; Chenton v. Frewen, 2 Drew & S. 390. Bunbury v. Bunbury, 2 Beav. 173; Walker v. Wild-

and the rule extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself.¹

A lawyer's executor has also been considered privileged,² but not an ordinary business agent, whom the client consults, and who is neither a lawyer nor represents a lawyer. A law student does not come under the category of clerks; and should a client consult a mere student who is not admitted, even though he erroneously thought the student a practicing attorney, the communications are not privileged.³

Interpreters present at conversations between foreigners and their attorneys for the purpose of interpreting, are bound to the same secrecy as the attorneys themselves, and will not be compelled or allowed, without the client's consent, to divulge the facts which they thus learn.⁴

A scrivener, appointed to raise money, has been held privileged,⁵ and so has a conveyancer employed to draw a deed, especially if he be an attorney at the same time,⁶ for then he is considered as acting in the line of his profession, and bound to conceal the facts disclosed by the person who employs him;⁷ and the privilege extends to a conveyancer who is consulted to draw deeds,

man, 6 Madd. 47; *Goodell v. Little*, 1 Sim. N. S. 155; *Lafone v. Falkland Islands Co.*, 4 Kay & J. 34; *Taylor v. Forster*, 2 Car. & P. 195; *Chant v. Brown*, 9 Hare, 790; *Mills v. Oddy*, 6 Car. & P. 731; *Ross v. Gibbs*, Law R. 3 Q. B. 91; *Fenner v. R. R.*, Law R. 7 Q. B. 767; *Jackson v. French*, 3 Wend. 337; *Brand v. Brand*, 39 How. Pr. 193; *Sibley v. Waffle*, 16 N. Y. 180.

¹ *Taylor v. Foster*, 2 Car. & P. 195; *Bowman v. Norton*, 5 Car. & P. 177; *Mills v. Oddy*, 6 Ibid. 728; *Jackson v. French*, 3 Wend. 337.

But the clerk, like the attorney, may be asked whether he has received a particular paper from the client. (*Eicke v. Nokes*, *Moody & M.* 303; *Goodlight v. Bridge*, — Loft. 27.)

² *Fenwick v. Reed*, 1 Mer. 114; *Wharton on Evidence*, sec. 582.

³ *Barnes v. Harris*, 7 Cush. 576; *Fountain v. Young*, 6 Esp. 113; *Andrews v. Solomon*, 1 Peters C. C. 356; *Holman v. Kimball*, 22 Vt. 555; *Landsberger v. Gorman*, 5 Cal. 450; *Sibley v. Waffle*, 16 N. Y. 180.

⁴ *Du Barre v. Livette*, Peake, 77; *Goddard v. Gardner*, 28 Conn. 172; *Jackson v. French*, 3 Wend. 337; *Taylor v. Foster*, 2 Car. & P. 195; *Fountain v. Young*, 6 Esp. 113; *Parker v. Carter*, 4 Munf. 273; *Brayton v. Chase*, 3 Wis. 274.

⁵ *Wharton on Evidence*, sec. 581; *Borum v. Font*, 15 Ind. 50; *Turquand v. Knight*, 2 Mees. & W. 100. But see *Coon v. Swan*, 30 Vt. 6; *De Wolf v. Strader*, 26 Ill. 225.

⁶ *Linthicum v. Remington*, 5 Cranch C. C. 546; *Parker v. Carter*, 4 Munf. 273; *Carpmael v. Powis*, 1 Phillim. 687; *Cromack v. Heathcote*, 2 Brod. & B. 4. See *Turquand v. Knight*, *supra*. See, *contra*, *Hatton v. Robinson*, 14 Pick. 416; *Randel v. Yates*, 48 Miss. 685; *Mathews' Estate*, 1 Phila. 292.

⁷ *Parker v. Carter*, 4 Munf. 273.

if the communication be made in a professional capacity, whether he accepts the employment or not.¹ But it has been held that conveyancers, not being attorneys, are not privileged.²

§ 162. A client also protected in his communications to counsel.—“The question,” says Wharton, “whether a client can be compelled to disclose his confidential communications to his legal adviser, draws peculiar interest from the statutes enabling parties to be called as witnesses by their opponents. It is obvious that the guard against the disclosure of such communications by counsel would be a mockery if the client could be compelled to disclose that as to which counsel’s lips are sealed. It would be absurd to protect by solemn sanctions professional communications when the lawyer is examined, and to leave them unprotected at the examination of the client.” The English House of Lords, however, in a case of comparatively early date, intimated that a client might be compelled by bill in equity to disclose any communications made by him to his counsel before litigation had been invoked;³ but in England this distinction has been deplored, if not repudiated,⁴ and in the United States has never been tolerated. The rule may then be stated to be, that the protection is also extended to clients. A party is not obliged as a witness to disclose any consultation he may have had with his counsel in relation to his business.⁵

The true view is, that communications which the lawyer is precluded from disclosing, the client cannot be compelled to disclose.⁶ Where, however, a party offers himself as a witness, it seems that he may be asked as to his communications to

¹ *Crissler v. Garland*, 19 Miss. 136.

² *Estate of Mathews*, 1 Phila. 292; *Machette v. Wanless*, 2 Colorado T. 169; *Randel v. Yates*, 48 Miss. 685. An attorney, consulted as a friend and not as an attorney, may be compelled to testify. *Annesley v. Anglesea*, Macnally, 241; *Hoffman v. Smith*, 1 Caines, 157.

³ Wharton on Evidence, sec. 583; *Radcliffe v. Pursman*, 2 Br. P. C. C. 514.

⁴ *Walsingham v. Goodricke*, 3 Hare, 127; *Meath v. Winchester*, 10 Bligh, 375; *Walker v. Wildman*, 6 Madd. 97; *Preston v. Carr*, 1 Young & J. 175; *Pearse v. Pearse*, 1 De Gex & S. 24; *Miner v. Morgan*, Law R. 8 Ch. 361; *In re Macgregor Laird*, 1 Ad. & E. 307.

⁵ *Hemenway v. Smith*, 28 Vt. 701.

⁶ Wharton on Evidence, sec. 583; *Thompson v. Falk*, 1 Drew. 21; *Vent v. Pacey*, 4 Russ. 193; *Combe v. London*, 1 Russ. 631; *Holmes v. Baddeley*, 1 Phill. 476; *Hemenway v. Smith*, 28 Vt. 701; *Carnes v. Platt*, 15 Abb. Pr. N. S. 337; *Bigler v. Regier*, 43 Ind. 112.

his counsel as to that part of the case he undertakes to prove.¹

Communications made to a prosecuting attorney, relative to criminals or suspected persons, are privileged, and cannot be divulged without the consent of the person making them. But if he voluntarily testifies to the *actual* conversation, the prosecuting attorney may testify in regard to it.²

§ 163. Privilege applied to documents.—For the same general reasons for which an attorney is not permitted to disclose communications, he is not obliged, when intrusted by his client with papers relating to the subject of professional confidence, to produce them; nor can he be compelled, as a witness, to state their contents.³ And a party, wishing to avail himself in evidence of a paper in the possession of the attorney of his adversary, must give reasonable notice to produce it; and notice at the trial is not sufficient. He cannot have the benefit of the evidence by subpœnaing the attorney to produce it, and compelling him to testify if the document was delivered to him by his client.⁴ But, for the purpose of letting in secondary evidence, the adverse attorney may be asked if he has possession of a

¹ *Woburn v. Henshaw*, 101 Mass. 193.

A client having given evidence in chief in his own behalf, cannot, on cross-examination, be compelled to divulge statements made by him when consulting as a client an attorney at law. Communications made in consultation by a client to his attorney are privileged and protected from inquiry, when the client is a witness, as well as when the attorney is a witness. Statements made by a client to his legal adviser are privileged, though no action is at the time pending or contemplated, concerning the matter of which such statements are made. *Bigler v. Reyher*, 43 Ind. 112.

² *Oliver v. Pate*, 43 Ind. 132.

In Massachusetts, it is said, that where a party offers himself as a witness as to what he said to his counsel, he may be compelled to undergo a cross-examination upon the same subject. If the client sees fit to be a witness, he makes himself liable to full cross-examination, like any other witness. And it is held that this is true even as to defendants in criminal cases. (*Inhabitants of Woburn v. Henshaw*, 101 Mass. 193; *Commonwealth v. Mullen*, 97 Mass. 545.

³ *Bottomley v. Osborne*, Peake Ad. Cas. 99, 101; *Nulls v. Oddy*, 6 Car. & P. 728; *Bate v. Kinsey*, 1 Crompt. M. & R. 38; *Marston v. Downes*, 6 Car. & P. 381; *Walker v. Wildman*, 6 Madd. 47; *Cook v. Hearn*, 1 Moody & R. 201; *Jackson v. Denison*, 4 Wend. 558; *Jackson v. Burtis*, 14 Johns. 391; *Robson v. Kemp*, 5 Esp. 53.

⁴ *McPherson v. Rathbone*, 7 Wend. 216; *Dixon v. Parmelee*, 2 Vt. 185. See, also, *Bonesteel v. Lynde*, 8 How. Pr. 226; *Trotter v. Latson*, 7 Ibid. 261; *Courtail v. Thomas*, 9 Barn. & C. 288; *Amey v. Long*, 9 East, 473; *Busk v. Lewis*, 6 Madd. 29; *Mitchell's Case*, 12 Abb. Pr. 264.

certain document,¹ and when it was put into his hands ; but not as to its situation or appearance.²

The names, times, or dates contained in a written instrument, though not known from the communication of the client, yet come to the knowledge of the attorney from the delivery of the instrument by his client, are privileged.³ An attorney cannot be compelled to produce a will which he holds as attorney for a devisee claiming under it;⁴ nor is the attorney for a party bound to state the contents of a document of which he first obtained a knowledge by having read it at the suggestion of his counsel in the course of a consultation in the cause.⁵ Where it appeared that a paper had been delivered to a counsel by his client, with instructions not to make use of it in court, it was held that he was not bound to produce it in evidence in another cause, in which he was also counsel,⁶ much less in the pending action, or testify to its contents. An attorney, having been intrusted with certain papers by his client, which, after the termination of the suit, were left with the attorney by his client for the benefit of a party to another cause, for whom he was also attorney, he was held not bound to produce them in evidence.⁷ Neither the documents, nor consultations in reference to them, can be called for.⁸

“When a solicitor has in his possession a document for his client, he cannot, against the will of his client, be compelled to produce it, even by a person who has an equal interest in it with the client.⁹ But a solicitor may be asked whether he has papers of his client in court, and if by his answer, which is compulsory, he admit the fact, secondary evidence of their contents may be given if the originals are not produced.¹⁰ And although counsel

¹ *Coats v. Birch*, 2 Ad. & E. N. S. 252; 1 Gale & D. 647; 5 London Jurist, 1009; *Bevan v. Waters*, Moody & M. 235.

² *Driggs v. Rockwell*, 11 Wend. 504; *Wheatley v. Williams*, 1 Mees. & W. 533.

³ *Beard v. Ackerman*, 5 Esp. 119; *Bate v. Kinsey*, 6 Moody & R. 42.

⁴ *Carter v. Lames*, 2 Moody & R. 47.

⁵ *Davies v. Water*, 9 Mees. & W. 608.

⁶ *Lynd v. Judd*, 3 Day, 499; *Dale v. Livingston*, 4 Wend. 558.

⁷ *Jackson v. Burtis*, 14 John. 391.

⁸ *Follett v. Jefferyes*, 1 Eng. L. & E. 172; *Goodall v. Little*, 3 Ibid. 79. See *Warde v. Warde*, 5 Ibid. 217.

⁹ *Wharton on Evidence*, sec. 585; *Newton v. Chaplin*, 10 Com. B. 356; *Laing v. Barclay*, 3 Stark. R. 42; *Volant v. Soyner*, 13 Com. B. 231; *Bargaddie Coal Co. v. Wark*, 3 Macq. S. C. 668; *Crosby v. Berger*, 11 Paige, 377.

¹⁰ *Wharton on Evidence*, sec. 585; *Dwyer v. Collins*, 7 Ex. 639; *Brandt v. Klain*, 17 Johns. 335; *Phelps v. Prew*, 3 El. & B. 430; 23 Law J. Q. B. 140.

can be compelled to produce any paper whose production would have been obligatory on the client so far as to let in secondary evidence of contents, yet the fact that the papers were communicated to him by his client for his professional opinion, is a good excuse for their non-production.¹ This is peculiarly applicable to cases where the lawyer is called upon by subpoena to produce his client's papers, his client being a stranger to the suit. Were it not so, no man's titles, so it is argued in England, could be safe from fishing explorations for the purpose of discovering defects. In this country, under our registry system, the reason is less applicable, but the principle still obtains."²

"If a legal adviser permits his client's papers to pass out of his hands into those of strangers, or if such papers are in any way extracted from his custody, they may be put in evidence by the party by whom they are held as against the client. So far has this been pushed that it has been held that if an attorney permits a witness to see such writings, such witness, not being a clerk of the attorney or legal adviser of the client, may be called to give secondary evidence of the writings, due notice being first given to produce them on trial.³ It is otherwise as to papers passing into the hands of the attorney's agents or representatives, the papers in such hands being entitled to the same protection they enjoyed when in the hands of the attorney."⁴

An attorney or counsel, who, as such, has been intrusted with papers or documents, is not bound to produce them in evidence on the call either of the opposite party or of a third person.⁵ It has been held that papers intrusted to an attorney in professional confidence are not necessarily to be deemed confidential communications, and their production can be resisted only when a controversy exists or is anticipated between parties in relation to the subject on which communications were made to the attorney

¹ *Ramsbotham v. Senior*, Law R. 8 Eq. 575; *Ex parte Campbell*, Law R. 5 Ch. Ap. 703; *Rhoades v. Selin*, 4 Wash. C. C. 718; *Durkee v. Leland*, 4 Vt. 612; *Dwyer v. Collins*, 7 Ex. 639; *Bevan v. Waters*, 1 Mees. & W. 235; *Doe v. Harris*, 5 Car. & P. 592; *Doe v. Gilbert*, 7 Mees. & W. 102; *Doe v. Langdon*, 12 Ad. & E. N. S. 711.

² *Wharton on Evidence*, sec. 585; *Rex v. Hunter*, 3 Car. & P. 591.

³ *Lloyd v. Mostyn*, 10 Mees. & W. 481. But see *Fisher v. Henning*, 1 Ph. Ev. 170.

⁴ *Wharton on Evidence*, sec. 586; *Fenwick v. Reed*, 1 Mer. 114, 120.

⁵ *Kellogg v. Kellogg*, 6 Barb. 116; *Jackson v. Burtis*, 14 Johns. 391; *Durkee v. Leland*, 4 Vt. 612; *Lynde v. Judd*, 3 Day, 499.

on the documents intrusted to him.¹ But this is but another way of stating that the communications must be restricted to pending suits, and we have already attempted to demonstrate that this is not the correct rule.²

As to the production of papers, the possession of the attorney is deemed the possession of the client. When papers are received in a confidential and professional capacity, their contents need not be disclosed. The doctrine has been applied to deeds, bills of sale, and other papers.³ They need not be produced even for the inspection of a grand jury.⁴ But the paper must be produced for the purposes of identification, and the attorney must answer as to the fact of possession, so that secondary evidence of their contents may be given. There is a well-defined distinction between this and disclosing their contents.⁵ The most that can be required is to state whether or not the paper is in existence, and when and where the attorney last saw it.⁶

On a trial for murder, an attorney employed by the prisoner on the day of the alleged murder to draw for him certain papers—a lease and receipt—cannot be compelled to testify to the drawing of such papers by him, or to the contents thereof; nor as to the state of either of the papers, when delivered to the prisoner, where such papers are not in any manner necessarily connected with the perpetration of any crime, and they cannot of themselves in any way aid in the commission of any fraud or crime.⁷

In an action against the grantees in a deed, upon a covenant therein that they would assume and pay certain specified incum-

¹ *Peck v. Williams*, 13 Abb. 68.

² See *ante*, sec. 143 *et seq.*

³ *Lynde v. Judd*, 3 Day, 499; *Mallory v. Benjamin*, 9 How. Pr. 419; *Kellogg v. Kellogg*, 6 Barb. 116; *Jackson v. Burtis*, 14 Johns. 391. See, as to combination between attorney and client to prevent inspection, *People v. Sheriff*, 29 Barb. 622.

⁴ *Anon.* 8 Mass. 370; *Durkee v. Leland*, 4 Vt. 612. Where notes suggested to have been forged were delivered to an attorney in the common course of business by a client suspected of committing the forgery, the court refused to compel the attorney to produce them for the inspection of the grand jury. (*State v. Squires*, 1 Tyler, 147.)

⁵ *People v. Sheriff*, 7 Abb. Pr. 96; *Phelps v. Prew*, 24 Eng. Law and Eq. 96; *Dwyer v. Collins*, 21 L. T. N. S. 225; *Broad v. Pitt*, *Moody & Malkin*, 233; *Eicke v. Nokes*, *Ibid.* 303. See *Rhoades v. Selin*, 4 Wash. C. C. 715.

⁶ *Durkee v. Leland*, 4 Vt. 612; *State v. Squires*, 1 Tyler, 147; *Anon.* 8 Mass. 370; *Kingston v. Gale*, 8 Vin. Abr. 548; *Brandt v. Klein*, 17 Johns. 335.

⁷ *Graham v. People*, 63 Barb. 468.

brances, as portions of the purchase-money, an attorney, who drew the deed, was asked whether the deed was read to the grantees after it was drawn, and whether the question was up then as to whether the grantees would be personally liable on the deed. These questions were held not permissible, and the matters came under the head of privileged communications.¹

It is the province of the court to judge whether the paper is privileged or not, and the witness is required to submit the document to the inspection of the court, and if, after reading it, the judge differs from the witness, he may, it seems, allow it to be read; and the witness is in contempt if, after proper notice, he does not produce it for that purpose. It is for the court to determine whether the principle of protection extends to it.²

After a notice to produce.—If, upon notice given to the attorney of a party to produce a document in his possession, he neglects so to do, he should not be called as a witness to prove its contents.³ If an attorney for one not a party to an action, having refused at the trial to produce a deed belonging to his client, is directed by the judge to give parol evidence of its contents, the parties to the action have no right to object to such evidence going to the jury, even upon the supposition that the judge acted erroneously.⁴ Where a notice has been given to produce a deed, but which notice cannot be proved, the attorney for the other party cannot be called upon to produce it, he having admitted a receipt of the notice;⁵ and the attorney for the opposite party cannot be asked whether he has with him a rule of court relating to the cause, with a view to give secondary evidence of the rule, no notice to produce or *subpœna duces tecum* having been served.⁶ Where a deed is in the hands of an attorney, who holds it not merely as attorney but as a security for money owing to him from his client, and the attorney, being

¹ Rogers v. Lyon, 64 Barb. 373.

² Morgan v. Shaw, 4 Madd. 57; Parkhurst v. Lawten, 3 Ibid. 121; Beer v. Ward, Jac. 77; Commonwealth v. Braynard, 1 Thach. C. C. 146; Doe v. Egremont, 2 Moody & R. 386; Copeland v. Watts, Stark. 95; Bradshaw v. Bradshaw, 1 Russ. & M. 358; Walsh v. Trevanion, 15 Sim. 578; Mitchell's Case, 12 Abb. Pr. 261.

³ Bothomley v. Osborne, Peake Ad. Cas. 101; Bevan v. Waters, Moody & M. 235; 3 Car. & P. 520.

⁴ Marston v. Downes, 1 Ad. & E. 31; 4 Nev. & M. 861; 6 Car. & P. 381.

⁵ Read v. Passer, 1 Esp. 216; Peake, 231.

⁶ Cook v. Hern, 1 Moody & R. 20.

called on a *subpœna duces tecum*, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents.¹

§ 164. Privileged communications as applied to deeds, etc.—An attorney is not allowed to produce a deed which has been deposited with him confidentially in his professional character,² and if the deed has been obtained out of his hands for the purpose of being produced in evidence by another witness, it cannot be received, nor is a copy of such deed so obtained good secondary evidence.³

A solicitor to a third person is bound to produce his client's lease executed by the defendant, provided the production will not operate to the prejudice of his client.⁴ But if the reading of such a document would operate to the prejudice of a third person, the court will not expect it to be read. On an issue as to the liability of the defendants as partners, an attorney subpœnaed to produce a composition deed, executed between them and another firm, showing the partnership, may object to the production of the instrument, on the ground that the disclosure of its contents may prejudice the latter in dispute with others.⁵

If an attorney be the attesting witness to a deed executed by the client he may be compelled to prove its execution,⁶ and the court will sometimes, as where an attorney attests a warrant of attorney, summarily compel him to make an affidavit of the fact,⁷ and an attorney may generally be compelled to prove by whom he is employed in an action,⁸ or to identify his client:⁹ and

¹ *Gilbert v. Ross*, 7 Mees. & W. 102; 8 Dowl. Pr. 389; 4 Jur. 321.

² *Fisher v. Hemming*, 1 Phil. Ev. 132.

³ *Fisher v. Hemming*, 1 Phil. Ev. 132.

⁴ *Copeland v. Watts*, 1 Stark. 95.

⁵ *Harris v. Hill*, Dowl. & R. N. P. C. 17; 3 Stark. 140. In an action of covenant, the attorney of a third person, who holds the deed as such, is not bound to produce it, but the plaintiff may go into secondary evidence. *Ditcher v. Kendrick*, 1 Car. & P. 161. Though an attorney has received a deed from his client for the purpose of the cause, he may be asked whether he has it, in order to let in secondary evidence of its contents, in case it is not produced, as in the case of other instruments. *Coates v. Birch*, 1 Gale & D. 647; 5 Jur. 1009; 1 Dowl. N. S. 540.

⁶ *Avery v. Roe*, 6 Dowl. 528; 3 Barb. Ch. 528.

⁷ *Ex parte Morrison*, 9 Dowl. 94.

⁸ *Levy v. Pope*, 1 Moody & M. 410; *Brown v. Payson*, 6 N. H. 443; 1 Caines, 258; 11 Wheat. 280.

⁹ *Study v. Sanders*, 2 Dowl. & R. 347.

if the plaintiff in the action, to state where he lives, to state also whether or not he made a particular offer or tender to the opposite party in the cause,¹ whether a particular document is in his client's handwriting,² or whether he has not received a notice from a third party,³ or without any notice to produce, whether he received a particular document from the client.⁴ The attorney may also be asked as to the execution of a deed in his presence.⁵ An attorney subpœnaed to produce a document at a trial may, in his discretion, refuse to produce it, on the ground that it has been intrusted to him by a client. He is neither bound to produce it nor to answer a question with respect to its nature.⁶

In ejectment by a rector to recover land as a parcel of the glebe, a book describing the lands subject to tithes, and a map of the glebe, were produced by an attorney and solicitor, who had been employed by J, the preceding rector, who was also owner of the advowson, to collect the tithes, and afterward to sell the advowson. The book was given to him for the former purpose; the map with a view to the sale. The heir and the executors of J authorized him to produce them. The advowson was sold to A, who had presented the lessor of the plaintiff. The court held that the map was not a privileged communication; and that if it was, the privilege had been waived.⁷

In an action on a covenant in a lease by assignee of the reversion, the plaintiff put in a conveyance to him of the reversion, subject to mortgage debts. The defendant, in order to prove that the legal estate was out of the plaintiff, by reason of the conveyance of the reversion having been made subject to a mortgage, called the attorney of a person to whom the mortgage had been transferred to produce the mortgage deed, under a *subpœna duces tecum*. The attorney objected, and stated that he had been instructed by his client not to produce it. The at-

¹ Turner v. Raylton, 2 Esp. 474.

² Hurd v. Morins, 1 Car. & P. 372; Aleyer v. Sexton, 2 Stark. 274; Doe v. Andrews, 2 Camp. 845; Johnson v. Darvome, 19 Johns. 134.

³ Spenceley v. Schullenberg, 7 East, 357.

⁴ Eicke v. Nokes, 1 Moody & M. 303; Jackson v. Burtis, 11 Johns. 391; 3 Day, 499; 4 Vt. 612. See Hibberd v. Knight, 17 Law J. Ex. 119; Marston v. Downes, 6 Car. & P. 381.

⁵ Sandford v. Remington, 2 Ves. Jr. 189.

⁶ Volant v. Soyer, 13 Com. B. 231; 22 Law J. Com. P. 83.

⁷ Marriott v. Hertford, (Marquis) 13 Jur. 632; 19 Law J. Q. B. 526.

torney for the original mortgagee was then called to give secondary evidence of its contents. He had a draft of a mortgage, but did not know whether it was a copy of the deed in question, unless he knew what that deed was. The judge ordered the first witness to produce the deed, and to allow the second witness to look at the indorsement, upon which he identified it as the deed of which the draft was a copy, and gave secondary evidence of its contents. It was held that the privilege of the client was not violated by requiring the attorney to show the indorsement on the deed, for the purpose of enabling the witness to identify it.¹

It is said there can be no doubt of the rule that a mortgagee or purchaser is not bound to produce his title-deeds, and may resist the production of all deeds which are muniments of title; but it is said that this rule does not extend to the mortgage deed itself, as to which different considerations prevail. Also, that a solicitor employed by both mortgagor and mortgagee, and who ultimately becomes transferee of the rights previously acquired by the mortgagee, cannot set up a professional privilege as if he had acted confidentially for one only of the parties, nor resist the production of the deeds as if he were in the position merely of a third party; and a mortgagee is bound to produce the mortgage deed for the inspection of the mortgagor. It is the mortgage deed which conveys the property by way of pledge, and which contains the proviso for redemption, by virtue of which the mortgagor is entitled to redeem the property. The mortgage deed, therefore, is as much the evidence of the mortgagor's title to redeem, as it is of the mortgagee's estate.²

A vendor had a draft of a conveyance made by his own attorney, from which the deeds were afterward prepared. The attorney was paid for this business by the vendor and purchaser in moieties, by agreement, but the latter employed an attorney on his own part to look over the draft. It remained after-

¹ *Phelps v. Prew*, 3 El. & B. 430; 2 Car. Law Rep. 1422; 18 Jur. 249; 23 Law J. Q. B. 140.

² *Patch v. Ward*, 1 Law R. Eq. 436. But it is also held that in an action against a mortgagor, the attorney of the mortgagee, who has the mortgage deed, cannot be compelled to produce it, if he objects to do so, nor can he be compelled to give evidence of its contents; but he may be asked for what purpose the money was raised, and secondary evidence may be given of the contents of the mortgage deed. (*Marston v. Downes*, 4 Nev. & M. 861; 1 Ad. & E. 31; 6 Car. & P. 381.)

ward with the vendor's attorney. It was held that such draft was confidentially deposited with the latter, by the purchaser as well as the vendor, and could not be produced on a trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney.¹

But where, by an order of the court of chancery, made in a suit depending between a lessee and lessor, the lease was deposited in the hands of the lessor's attorney, the lessee being at liberty to inspect the same, upon ejectment brought by the lessee against the tenant in possession, it was held that the attorney of the lessor was bound to produce the lease, it not being part of the lessor's title.²

§ 165. Testamentary communications.—The privilege does not apply when the question arises as to the intention of a deceased person in respect to the disposition of his estate. It is simply meant to protect the living in their business relations. Where the rights and interests of clients and those claiming under them come in conflict with the rights and interests of third persons, there can be no difficulty in applying the rule. But there is a difficulty where cases of testamentary disposition arise. The disclosure in such cases can affect no right or interest of the client. The apprehension of it can present no impediment to the full statement of his case to his solicitor, and the disclosures, when made, can expose the court to no greater difficulty than presents itself in cases where the views and intentions of persons or of the objects for which the disposition is made, are unknown. In the cases of testamentary dispositions, the very foundation of the rule seems to be wanting, and in the absence, therefore, of any illegal purpose being entertained by the testator, there does not appear to be any ground for applying it.³

As to disclosures of the communications made by testators,

¹ Doe d. Strode v. Seaton, 2 Ad. & E. 171; 4 Nev. & M. 81.

² Courtail v. Thomas, 9 Barn. & C. 288; 4 Man. & R. 218. Where a deed is in the hands of an attorney, who holds it not merely as attorney, but as a security for money owing to him from his client, and the attorney, being called on a *subpoena duces tecum*, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents. (Doe d. Gilbert v. Ross, 7 Mees. & W. 102; 8 D. P. C. 389; 4 Jur. 321.)

³ Russell v. Jackson, 9 Hare, 387; Wharton on Evidence, sec. 591.

in *Russell v. Jackson*, 15 Jur. 1, 117, the contest was between the heirs-at-law and a devisee. The heirs claimed that the devise was upon a trust unexpressed, because illegal. The question was, whether the solicitor by whom the will was drawn should be allowed to testify what was said by the testator contemporaneously upon the subject. The devisee claimed the benefit of the rule. The Vice Chancellor said: "When we pass from cases of conflict between the rights of a client and parties claiming under him—and those of third persons—to cases of a testamentary disposition of a client, do the same reasons apply? The disclosure in such cases can affect no right or interest of the client, and the apprehension of it can present no impediment to a full statement to the solicitor, unless he were contemplating an illegal disposition—a case to which I shall presently refer; and the disclosure when made would expose the court to no greater difficulty than it has in all cases, when the views and intentions of parties, or the objects for which the disposition is made, are unknown. In the case, then, of a testamentary disposition, the very foundations on which the rule proceeds seem to be wanting, and in the absence of any illegal purpose entertained by the testator, there does not seem to be any ground for applying the rule in such a case. Can it be said, then, that the communication is protected, because it may lead to the exposure of an illegal purpose? I think not; and that evidence, otherwise admissible, cannot be rejected upon such grounds. Another view of the case is, that the protection which the rule gives is the protection of the client: and it cannot be said to be for the protection of the client that evidence should be rejected, the effect of which would be to prove a trust created by him, and to destroy a claim to take beneficially by the parties accepting the trust."¹

On a question of marriage and legitimacy, an attorney, who drew a will for the alleged husband, deceased, in which the children of the connection set up as wedlock are described as the "natural children" of the testator, may, without violating professional confidence, testify what was said by the testator about the character of the children and his relations to their mother, in interviews between the testator and himself preced-

¹ *Russell v. Jackson*, 15 Jur. 1, 117; *Blackburn v. Crawford*, 3 Wall. 176.

ing and connected with the preparation of the will.¹ A waiver under such circumstances has been presumed as much a waiver as if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related.

A communication made by a client to an attorney, in the office of the latter, in the presence of a son of the testator who lived in his family, but who had no connection with the professional business of his father, was held not privileged in relation to the son.² Where a will was brought to an attorney by the wife of a legatee named in it, for the purpose of inducing the attorney to raise money on it, the attorney who had taken a copy of the will was deemed a good witness in support of a prosecution against the party for forging the will.³

A witness (the solicitor who drew the will propounded) having in his deposition referred to certain entries in his books with reference to the drawing of the will, and having, as required by an interrogatory, given copies of those entries and allowed the examiner to collate them with the originals, a motion to compel the witness to produce the books themselves was rejected.⁴

In case of a motion that certain writings should be produced which were referred to by a witness in his deposition, such witness being the solicitor of the party in the cause opposing a codicil, the motion was resisted on the ground of privilege. It was held, first, that information collected by the solicitor from a subscribed witness to the codicil is not privileged. It seems it would be otherwise if collected by the client and communicated to the solicitor. Secondly, that letters written to the principal solicitor by another solicitor, also employed by the client to collect evidence in the matter, and with directions to communicate it to the principal solicitor, are privileged. Third, that letters written by the testator to his solicitor with regard to a bond executed by testator in favor of the party propounding the codicil, are not privileged communications as between the solicitor and the executor opposing the codicil, by whom he was also employed as his solicitor in this matter.⁵

¹ *Blackburn v. Crawfords*, 3 Wall. 175. See *Russel v. Jackson*, 15 Jur. 1-117.

² *Goddard v. Gardner*, 28 Conn. 172.

³ *Rey v. Farley*, 2 Car. & K. 313.

⁴ *Goodrich v. Jones*, 2 Curt. 671.

⁵ *Mackenzie v. Yeo*, 2 Curt. 865.

An attorney who draws up a will, is present at the time of its execution, sees the will after the death of the testator in the possession of the testator's family, reads it, and recollects its principal provisions, is a competent witness to prove these facts, and his evidence is not privileged.¹

§ 166. Privilege as applied to fraudulent transactions.

—The fact that an attorney was employed by his clients to assist them in a transaction which, from what was said in his presence, he must have known to be a fraud upon their creditors, will not deprive their communications of the seal of professional confidence, however contrary it may appear to good morals. The law seems to be so settled, as where an attorney, who had drawn an agreement between a sheriff and his under-sheriff, was called to prove that such agreement was corrupt and illegal. But the professional privilege was extended to the case.² And so where an attorney had been applied to for the purpose of drawing a fraudulent assignment, which he declined doing, and the assignment was subsequently drawn by some other person. The attorney first applied to was offered as a witness to prove the fraud. But the court rejected the evidence, upon the ground that the communications were privileged.³

So where the client consulted an attorney as to the best manner of evading the demands of his creditors, and the attorney recommended a fraudulent mortgage which he prepared accordingly, the attorney being examined as a witness to prove those facts, the master of the rolls suppressed the deposition as being a breach of professional confidence.⁴ But the privilege has never been held to cover a communication made to an attorney to obtain professional advice or assistance as to the intended commission of a felony or other crime, which is *malum in se*.⁵

§ 167. As applied to admissions.—An admission obviously addressed to an attorney in order to elicit a legal opinion

¹ *Graham v. O'Fallon*, 4 Mo. 338.

² *Anon. Skin.* 404; *Holt*, 76; 1 *Ld. Raym.* 733.

³ *Cromack v. Heathcote*, 4 J. B. Moore, 387.

⁴ *Hyde v. M* —, 1 *Molloy*, 450*n.* To the same effect, see *Doe v. Harris*, 5 *Car. & P.* 592; *Foster v. Hall*, 12 *Pick.* 89; *Clay v. Williams*, 2 *Munf.* 105; *Bank v. Mercereau*, 3 *Barb. Ch.* 597.

⁵ *Ibid.* *Dudley v. Beck*, 3 *Wis.* 274.

from him touching the rights of the parties, as between themselves, is not competent evidence against them, and is privileged; and the fact that the admission was made to the attorney of the plaintiff, and not of these parties, makes no difference, because if the attorney of their adversary would consent to act as their attorney, and advise them, the rule should still apply, whether the attorney was paid for his advice or not.¹

A foreigner, unacquainted with the English language, being about to sue for a debt, engaged another to act as agent and interpreter in stating the case to attorneys, in order to employ them to bring the suit. Suit having been brought, and the agent and interpreter sworn to an admission made to him by the defendant of his indebtedness to plaintiff, it was offered to prove by the attorneys that the interpreter, in his statement of the case to them, had said that he never heard such admission. The attorneys having declined to answer, the evidence was held privileged.²

§ 168. As to acts done.—The privilege does not extend to every fact which the attorney may learn in the course of his employment. There is a difference between *communications made* by the client and acts done by him in the presence of the attorney. It is the privilege of one who is charged with a wrong, either public or private, to speak unreservedly with his counsel in preparing for his defense; but he should not be allowed to stop the mouth of one who was present when the wrong was done, upon the allegation that he was retained as counsel to see or aid in the transaction. Where the original ground of communication is *malum in se*, as if the attorney be consulted on an intention to commit a forgery or perjury, this is not included within the compass of professional confidence. But if the offense, as forgery, for example, committed without his being privy, comes to his knowledge, in the course of confidential transactions with his client in the way of business, he cannot be compelled to assist in proving it.³ There appears no reason for excluding the attorney when he has witnessed a transaction in the way of bus-

¹ Bowers v. Briggs, 20 Ind. 139; Borum v. Fouts, 15 Ind. 50.

² Maas v. Bloch, 7 Ind. 202.

³ Coveney v. Tannahill, 1 Hill, 36; Clay v. Williams, 2 Munf. 105; Parker v. Carter, 4 Ibid. 273; Rex v. Haydn, 2 Fox & S. 379.

ness between his client and a third person, as the adjustment of an account, the execution of a deed, the payment of a sum of money, the giving up of securities, or the like. It is not necessary that a man should have an attorney to witness his dealings with third persons; and if one is called in, he may, like any other person who was present, be sworn to prove what was *done*; as, for instance, whether he was present when an account stated was signed, when and where it was signed, and who else was present; but not as to whether, when the attorney first saw the account stated, the evidence of a settlement was indorsed on it.¹ It makes no difference that the attorney was present in consequence of his engagement as counsel. If a document is executed or altered in the presence of counsel, he is not privileged from testifying as to the fact.²

So the attorney may be called against his client to prove a deed to which he is a subscribing witness, to testify concerning a warrant of attorney which he had subscribed as a witness, Lord Ellenborough remarking, in one case, that the attorney was bound to disclose all that passed at the time respecting the execution of the instrument, but not what took place in the concoction and preparation of the deed, or at any other time, and not connected with the execution of it, upon which matters he has a right to be silent.³ So an attorney has been required to prove his client's handwriting, although his knowledge of it was acquired solely from seeing him sign the bail-bond; and where the attorney had acquired a knowledge of his client's handwriting after the retainer, but without any confidential communication, it was held that he was bound to testify.⁴

An attorney's clerk may be called to prove that he received a particular paper from the client.⁵ And the attorney may be required to make discovery of a deed intrusted to him by his client, by answering whether there was such a deed, where it is,

¹ *Coveney v. Tannahill*, 1 Hill, 36; *Say and Seal's Case*, 10 Mod. 40; *Rex v. Watkinson*, 2 Strange, 1122; *Doe v. Andrews*, Cowp. 845; *Greenough v. Gaskill*, 1 Mylne & K. 98; *Studdy v. Sanders*, 2 Dowl. & R. 347.

² *Patten v. Moore*, 29 N. H. 163; *Crosby v. Burger*, 11 Paige, 378; *Bank v. Mersereau*, 3 Barb. Ch. 528.

³ *Robson v. Kemp*, 5 Esp. 52; 4 Esp. 235; *Doe v. Andrews*, Cowp. 845.

⁴ *Hurd v. Moring*, 1 Car. & P. 372; *Johnson v. Daverne*, 19 John. 134; *Sanford v. Remington*, 2 Ves. Jr. 189.

⁵ *Eicke v. Nokes*, 1 Moody & M. 303.

to whom delivered, when he last saw it, and in whose custody, but not to produce the deed or discover its contents.¹

Where anything is communicated to an attorney by his client, for the purpose of defense, he ought not to divulge it; but where he himself is, as it were, a party to the original transaction, that does not come to his knowledge in the character of an attorney, and he may be examined regarding it.²

§ 169. Actual observation.—An attorney cannot be compelled to testify as to whether a promissory note was indorsed when placed in his hands for collection. And notwithstanding the doctrines enunciated in the cases cited in the preceding section, there are cases not in harmony with them, and holding that the privilege extends not only to what the attorney hears, but what he sees from his situation as attorney. Nor can an attorney be compelled to prove the destruction of a written instrument in his presence, and while he was acting as attorney. One sense is privileged as well as another. He cannot be said to be privileged as to what he hears but not to what he sees, where the knowledge acquired as to both has been from his situation as an attorney. So an attorney cannot be compelled to state whether an instrument, when shown to him by his client, was stamped or not. If the knowledge comes to the attorney through his professional relation to his client, it is not important whether it is by what the attorney sees or what he hears.³ Such is the doctrine in Illinois.

§ 170. Communications in view of breaking the law.—The privilege does not extend to parties seeking for information or advice as to the best mode of infringing the law: communications of an intended offense must be disclosed.⁴ For this reason

¹ *Coveney v. Tannahill*, 1 Hill, 33.

² *Coveney v. Tannahill*, 1 Hill 33; *Duffin v. Smith*, Peakes, 108. See *Baker v. Arnold*, 1 Caines, 258.

³ *Dietrick v. Mitchell*, 43 Ill. 40; *Brown v. Payson*, 6 N. H. 443; *Robson v. Kemp*, 5 Esp. 52; *Wheatby v. Williams*, 1 Mees. & W. 541. See *Baker v. Arnold*, 1 Caines, 257; *Heister v. Davis*, 3 Yeates, 4.

⁴ Wharton on Evidence, sec. 590; *Rex v. Avery*, 8 Car. & P. 596; *Rex v. Farley*, 2 Car. & K. 313; S. C. 1 Den. C. C. 197; *Rex v. Brewer*, 6 Car. & P. 363; *Follett v. Jefferyes*, 1 Sim. N. S. 17; *Charlton v. Coombes*, 4 Giff. 372; *People v. Blakeley*, 4 Park. C. R. 176; *Bank v. Mersereau*, 3 Barb. Ch. 598; *People v. Sheriff*, 29 Barb. 622; *Graham v. People*, 63 Barb. 483.

An attorney may testify to any communication made to him to obtain pro-

the protection does not extend to communications, for instance, made to a lawyer for the purpose of raising money on forged securities. When the lawyer connives at an illegal purpose, he cannot claim any privilege. If he be a party to a fraud, no privilege attaches to the communications. Conniving at a fraud is no part of his duty as an attorney or solicitor. A lawyer, however, cannot be compelled to answer as to whether his advice to his client did not involve an illegal purpose.¹

"There is no confidence as to the disclosure of iniquity. One party cannot make another the confidant of a crime or a fraud, and be entitled to close up that person's lips upon any secret which the communicant may have the audacity to disclose relating to any fraudulent intention. Such confidences cannot exist.² But a mere charge is insufficient, and the court will look at the circumstances of each case."³

§ 171. Collateral matters.—An attorney is not privileged from giving evidence of collateral facts. He may therefore be obliged to prove that his client swore to and signed an answer, upon which the latter is indicted for perjury.⁴ But knowledge which an attorney obtains in the course of his employment as such, of the state of a deed, as whether when shown to him by his client it was stamped or not, is privileged.⁵ Knowledge of a client's handwriting, obtained by the attorney from having witnessed his execution of the bail-bond in the action, is not a confidential knowledge so as to privilege the attorney from an-

fessional advice or assistance, as to the commission of a felony, or other crime which is *malum in se*. Thus, a communication made to an attorney at law, by a person seeking professional advice or assistance, to enable him to forge a contract, is not privileged. (*People v. Blakeley*, 4 Park. Cr. C. 176.)

¹ *Russell v. Jackson*, 9 Hare, 392; *Doe v. Harris*, 5 Car. & P. 594.

² *Gartside v. Outram*, 26 Law J. Ch. 113, 114; *Annesley v. Anglesea*, 17 How. St. Tr. 1139; *Mornington v. Mornington*, 2 Johns. & H. 697, 703; *Gore v. Bowser*, 5 De Gex & S. 30; *Goodman v. Holroyd*, 15 Com. B. N. S. 839; *Blight v. Goodliffe*, 18 Com. B. N. S. 757; *Bank v. Rich*, 32 Law J. Q. B. 300, 306; *R. v. Jones*, 1 Den. C. C. 166; *Rex v. Farley*, 1 Den. C. C. 197.

³ *Crisp v. Platel*, 8 Beav. 62; *Charlton v. Coombes*, 4 Giff. 372; *Bassford v. Blakesley*, 6 Beav. 131; *Doe v. Harris*, 5 Car. & P. 594; *Levy v. Pope*, *Moody & M.* 410; *Reynell v. Sprye*, 10 Beav. 51; *Follett v. Jefferyes*, 1 Sim. N. S. 1; *Hare on Discovery*, 2nd ed. 163; *People v. Blakeley*, 4 Parker Cr. C. 176; *Wharton on Evidence*, sec. 590, note.

⁴ *Jupp v. Andrews*, Cowp. 845; *Reeves v. Burton*, 6 Mart. (La.) N. S. 283; *Sheldard v. Harris*, 5 Car. & P. 592; *Walker v. Wildman*, 6 Madd. 47.

⁵ *Wheatley v. Williams*, 2 Gale & D. 140; 1 Mees & W. 533.

swering, when called, on the part of the plaintiff, to prove the defendant's handwriting on the trial.¹

A communication made by a client to his attorney, to obtain information as to a matter of fact, and not for the purpose of asking him his legal advice, is not privileged;² and the attorney conducting a cause in court may be called as a witness by the opposite side, and asked who employs him, in order to show the real party, and to let in his declarations.³ And an attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he has received to produce a paper in the hands of his client.⁴ What a mortgagor in treaty to raise money says to the attorney of the mortgagee, is not privileged.⁵ An attorney is not bound, however, to give evidence of a statement made by himself to the adverse party by the direction of his client.⁶ The privilege does not extend to information derived from other persons or sources, although obtained while acting as attorney.⁷

An attorney must disclose acts done in his presence by the client, as the execution of a deed, etc., but not a private confidential communication to him as to the reason for making it.⁸ But knowledge which an attorney obtains in the course of his retainer as such, of the state of a deed, as whether, when shown to him by his client, it was stamped or not, is privileged.⁹ An attorney receiving a document from his client, is not privileged from answering a question put for the purpose of letting in secondary evidence, whether the document is in his possession,¹⁰ or in court.¹¹

Testimony may be compelled as to facts derived from other

¹ *Hurd v. Moring*, 1 Car. & P. 372; *Bevans v. Waters*, Moody & M. 235; *Johnson v. Daverne*, 19 John. 134; *Coates v. Birch*, 2 Q. B. 252.

² *Bramwell v. Lucas*, 4 Dowl. & R. 367; 2 Barn. & C. 745.

³ *Levy v. Pope*, Moody & M. 410.

⁴ *Spencely v. Schulenberg*, 7 East, 357; 3 Smith, 325.

⁵ *Marston v. Downes*, 4 Nev. & M. 861; 3 Car. & P. 381; 1 Ad. & E. 31.

⁶ *Ripon v. Davies*, 2 Nev. & M. 310.

⁷ *Crosby v. Berger*, 11 Paige, 377.

⁸ *Sandford v. Remington*, 2 Ves. Jr. 189; *Jupp v. Andrews*, Cowp. 846; *Robson v. Kemp*, 4 Esp. 235; *De Voy's Lessee v. Burke*, 2 Fox & S. 191.

⁹ *Wheatley v. Williams*, 2 Gale, 140; *Brandt v. Klein*, 17 Johns. 335.

¹⁰ *Coates v. Birch*, 1 Gale & D. 647; 2 Ad. & E. N. S. 252; 1 Dowl. N. S. 540; *Bevans v. Waters*, Moody & M. 235.

¹¹ *Dwyer v. Collins*, 12 Eng. L. & Eq. 537; *Coveney v. Tannahil*, 1 Hill, 33.

sources than the relation of attorney and client.¹ An attorney may be asked whether the relation of attorney and client subsisted between him and a party, if he is not asked to detail what occurred.² He may be asked to supply the predicate for secondary evidence of a deed, whether he or the client has the deed.³ An attorney may be asked whether his client signed a bail-bond,⁴ whether a note put in his hands for collection was indorsed or not,⁵ and whether he has a paper in court relating to the cause, in order that a notice to produce it immediately may be a sufficient and reasonable notice.⁶ If there be any question about an erasure in a deed or will, the attorney may be asked whether he had ever seen the instrument in any other state.⁷ But this doctrine must be limited to a case where the attorney has his knowledge independently of any communication from the client; it does not mean that where the attorney, coming to the client for a confidential purpose, obtains some other collateral information, which he would not otherwise have possessed, he can be compelled to disclose it.⁸ If an attorney were present when his client was sworn to an answer, he might be a witness on an indictment for perjury, to prove the fact of taking the oath, it not being a fact peculiarly within his knowledge as an attorney, and not communicated to him in secrecy.⁹ The attorney may be compelled to testify as to the identity of parties, though, except from his intercourse with them professionally, he would know nothing of them.¹⁰

Communications by an attorney to the opposite party or to strangers, and communication between a plaintiff and defendant in the presence of an attorney, do not fall within the principle or terms of the rule which protects private communications be-

¹ *Chillicothe Co. v. Jameson*, 48 Ill. 281; *Sawyer v. Brickmore*, 3 Mylne & K. 572.

² *Leindecker v. Waldron*, 52 Ill. 283.

³ *Zabel v. Schroeder*, 35 Tex. 308.

⁴ *Hurd v. Moring*, 1 Car. & P. 545.

⁵ *Baker v. Arnold*, 1 Caines, 258.

⁶ *Rhoades' Lessee v. Selin*, 4 Wash. C. C. 715.

⁷ *Cutts v. Pickering*, 1 Vent. 197.

⁸ *Wheatley v. Williams*, 1 Mees. & W. 451.

⁹ *Jupp v. Andrews*, Cowp. 846. See *Duffin v. Smith*, Peake, 108; 1 Mylne & K. 109.

¹⁰ *Study v. Sanders*, 3 Dowl. & R. 347; *Beckwith v. Benner*, 6 Car. & P. 681; *Hurd v. Moring*, 1 Car. & P. 372; *Eicke v. Nokes*, Moody & M. 303; *Rex v. Watkinson*, 2 Strange, 1122.

tween parties and their professional advisers.¹ So communications from the opposite party to the attorney or to the client, in his presence, are not within the rule.² The attorney of the parties, for instance, may be examined as to the contents of a written notice, which had been received by him from the adverse attorney, requiring him to produce papers.³ Communications that pass between the attorneys of opposite parties are not privileged.⁴ Terms of compromise offered by an attorney to his client's creditors were not to be considered confidential when he had already published them.⁵ Communications made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information concerning a matter of fact, are not privileged. The character and office of an attorney are not then called into action.⁶

§ 172. As applied to third parties.—The protection thrown around privileged communications extends to the professional advisers of strangers to the suit⁷—as, for instance, to disclosures in regard to the contents of title-deeds of strangers when the deeds are confidentially deposited. The court, it seems, will inspect the documents and pronounce upon their admissibility according as their production may appear to be prejudicial or not to the client.⁸ The privilege, as applied to strangers, is co-extensive with that of the client, no greater and no less.⁹ Where, by an order of the court of chancery, made in a suit depending between a lessor and a lessee, a lease was deposited in the hands of the lessor's attorney, and the lessee was at liberty to inspect the same, it was held, in an action of ejectment brought

¹ *Griffith v. Davis*, 5 B. & A. 503; questioning *Gainsford v. Grammar*, 2 Camp. 9; *Ripon v. Davis*, 2 N. & M. 210; *Turner v. Railton*, 2 Esp. 274.

² *Desborough v. Rawlins*, 3 Mylne & C. 515.

³ *Spenceley v. Schulenbergh*, 7 East, 357.

⁴ *Gore v. Harris*, 8 Eng. L. & Eq. 147.

⁵ *M'Tavish v. Denning*, Anth. 113; *Yordan v. Hess*, 13 Johns. 492.

⁶ *Bramwell v. Lucas*, 2 Barn. & C. 744. See *Desborough v. Rawlins*, 3 Mylne & C. 515.

⁷ *Rex v. Withers*, 2 Camp. 578; *Sloman v. Horne*, 2 Esp. 696; *Bowman v. Norton*, 5 Car. & P. 177; *Merle v. Moore*, Ryan & M. 390; 2 Car. & P. 275. See *Higgs v. Taylor*, 1 Car. & K. 85; *Chant v. Brown*, 12 Eng. L. & E. 299.

⁸ *Copeland v. Watts*, 1 Stark. 95; *Hawkins v. Howard*, Ryan & M. 64. But see *Volant v. Sayer*, 16 Eng. L. & E. 426.

⁹ *Courtall v. Thomas*, 9 Barn. & C. 288; *Ditcher v. Kenrick*, 1 Car. & P. 161; *Rex v. Boddington*, 8 Dowl. & R. 726; *Harris v. Hill*, 3 Str. 140.

by the lessee against the tenant in possession, that the attorney of the lessor was bound to produce the lease, as it was not part of the lessor's title.¹ The attorney of a stranger to the cause cannot be compelled to produce a case with the opinion of counsel, which he holds confidentially for his client.²

§ 173. Disclosing address of client.—When the residence of plaintiff is not known to defendant, and it is necessary for his protection that it should be disclosed, his attorney may be compelled to disclose it, and to give the plaintiff's occupation.³ Proceedings may be stayed until the plaintiff can be found.⁴ If a defendant plead non-joinder of other persons liable with him, he may be compelled to give their residences.⁵ But the court will not make an order upon a solicitor compelling him to disclose the address of his client, (a defendant) who has absconded, and whom plaintiff seeks to serve with a *subpœna duces tecum*, to compel his appearance at the hearing with documents material to the plaintiff's case.⁶

§ 174. Privilege not lost by termination of relation.—“To permit professional confidence to be invaded when professional relations terminated would put the client at the counsel's mercy, for professional relations might be terminated in order that professional communications might be disclosed. The client, indeed, may remove the prohibition by consent that his counsel should be examined,⁷ which consent cannot be implied by the client merely calling the lawyer as a witness, without examining him as to such communications.⁸ If he do not, dissolution of their connection, no matter how it may occur, works

¹ *Courtail v. Thomas*, 9 Barn. & C. 288. See *Egremont v. Langdon*, 18 Law J. N. S. Q. B. 17.

² *In re Woodley*, 1 Moody & R. 390.

³ *Johnson v. Bixby*, 5 Barn. & Ald. 540; 1 Dowl. & R. 174; *Ninety-nine Plaintiffs v. Vanderbilt*, 1 Abb. Pr. R. 193; *Worten v. Smith*, 6 J. B. Moore, 110; *McRoeman v. Patrick*, 4 How. (Miss.) 533; *West v. Houston*, 3 Har. (N. J.) 15; *Evans v. Jones*, Cas. t. Hardw. 179; *Gynn v. Kirby*, 1 Strange, 402. But see *Braceby v. Dalton*, 2 Strange, 705.

⁴ *Short v. King*, 2 Strange, 681.

⁵ *Taylor v. Harris*, 4 Barn. & Ald. 93.

⁶ *Heath v. Crealock*, Law R. 15 Eq. 257; S. C. 5 Meak's Eng. R. 836.

⁷ *Wharton on Evidence*, sec. 580; *Merle v. More*, Ryan & M. 390.

⁸ *Vaillant v. Dodeman*, 2 Atk. 524; *Bate v. Kinsey*, 1 Crompt. M. & R. 38.

no change in regard to the inviolability of their intercourse.”¹ The privilege applies as much to communications made before as to those made during litigation.²

Even an assignee in bankruptcy is not empowered to consent that the professional communications of his assignor should be disclosed.³ An attorney will be prevented from testifying as to secrets confided to him, even after his name is stricken from the roll of attorneys.⁴

The rule, therefore, is perpetual in its operation. It extends to prohibiting the attorney from disclosing the privileged communications, not merely during the continuance of his relation to his client, but forever after—subject to the consent or waiver by the client.⁵ But if the attorney should ever be examined by his client as to these communications, he may be cross-examined on the same points, although a matter of professional confidence; but not on other points.⁶ The rule extends not only to testimony in court, but the attorney is also prohibited from divulging the communications in any other manner, at the peril of an action by the client for consequent damage.⁷ Thus, where an attorney employed to raise money on mortgage, disclosed to the proposed lender certain defects in his employer's title, by reason whereof the latter was subjected to various actions at the suit of the proposed lender, was delayed in obtaining the money he wanted, and compelled to pay a higher rate of interest, an action was held to lie against the attorney, notwithstanding he had been the attorney of the proposed lender before he had been retained by the plaintiff.⁸

¹ *Wilson v. Rastall*, 4 T. R. 759; *Cholmondeley v. Clinton*, 19 Ves. 268; *Charlton v. Combs*, 4 Giff. 372; *Calley v. Richards*, 19 Beav. 401; *Russell v. Jackson*, 9 Hare, 387; *Chant v. Brown*, 7 Hare, 79.

² *Minet v. Morgan*, Law R. 8 Ch. 361; 42 L. J. Ch. 627; 21 Week. R. 467; *Wilson v. Company*, 14 Eq. 477; 20 Week. R. 938.

³ *Bowman v. Norton*, 5 Car. & P. 177; Wharton on Evidence, sec. 580.

The privilege is said to cease after the death of the client, where the solicitor is made executor and residuary legatee. (*Crosby v. Berger*, 4 Edw. 254; S. C. 11 Paige, 377.)

⁴ *Cholmondeley v. Clinton*, 19 Ves. 268.

⁵ *Robson v. Kemp*, 5 Esp. 52; *Coveney v. Tannahill*, 1 Hill, 34; *Merle v. Moor*, Ryan & M. 390; 2 Car. & P. 275; *Parker v. Yates*, 12 Moore, 520.

⁶ 2 Stark. 231.

⁷ Com. Dig. action on the case for deceit, art. 5.

⁸ *Taylor v. Blacklow*, 3 Bing. N. C. 235; 3 Scott, 614.

The termination of the suit to which the communication relates does not render the communication less privileged, so long as it was made in a professional capacity.¹ But a conversation between a person who has been tried upon an indictment and acquitted and one who was his counsel on the trial, the conversation being had *after* the relation of counsel and client had ceased, and no further proceedings being contemplated, upon a subject unconnected with that to which the employment of the witness as counsel related, is not privileged,² nor are matters occurring in open court, as to what title was in question in the cause.³

§ 175. Communications made to legal adviser of two parties jointly.—Two or more persons sometimes address a lawyer as a common agent. So far as concerns strangers, these communications are privileged, but not as between themselves. As they stand on the same footing as to the lawyer, either can compel him to testify against the other as to their negotiations.⁴ So with communications made by one party to a mutual attorney for the purpose of being forwarded to the other party.⁵

But the attorney must have, in the first place, authority to disclose to the other. Papers put into his hands by either party, not to be shown to the other, but to be used exclusively for his own information, he will not be permitted to communicate.⁶ Privilege also has been held not to extend to communications made to counsel in the presence of all the parties to the controversy;⁷ nor to communications made by a party to a law student, whom the party thinks proper to consult independently: nor to communications overheard by a third person, so far as such third person is concerned.⁸

Where professional communications are made by two or more

¹ *Clark v. Richards*, 3 E. D. Smith, 89.

² *Mandeville v. Guernsey*, 38 Barb. 225; *Yordan v. Hess*, 13 Johns. 492.

³ *Levers v. Van Buskirk*, 4 Pa. 309.

⁴ Wharton on Evidence, sec. 587; *Shore v. Bedford*, 5 Man. & G. 271; *Reynolds v. Sprye*, 10 Beav. 51; *Warde v. Warde*, 3 Macn. & G. 365; *Earle v. Grout*, 46 Vt. 113; *Hatton v. Robinson*, 14 Pick. 416; *Rice v. Rice*, 14 B. Mon. 417.

⁵ *Perry v. Smith*, 9 Mees. & W. 681; *Baugh v. Pradocke*, 1 Moody & R. 182; 5 Barn. & Adol. 503; *Spencely v. Schulenburg*, 7 East, 357; *Desborough v. Rawlins*, Mylne & C. 515.

⁶ *Doe v. Seaton*, 2 Ad. & E. 171; *Doe v. Watkins*, 3 Bing. N. C. 421.

⁷ *Britton v. Lorenz*, 45 N. Y. 51.

⁸ *Barnes v. Harris*, 7 Cush. 576; *Hoy v. Morris*, 13 Gray, 519.

clients jointly, to their mutual legal adviser, the seal of confidence can only be removed by all. The consent even of a majority is not sufficient; and one or more cannot require a disclosure of the communication as evidence against the others, without their consent. Nor will the fact that one of the parties who has since died, might, were he living, be called upon to prove the facts which were stated by him to the attorney, entitle the other party to the testimony of the attorney. Communications made by a lender to his attorney concerning a loan, after the making thereof, when no one else was present, and which were drawn out in consequence of the confidential relation existing between the lender and the attorney, are also privileged.¹

§ 176. Correspondence between codefendants.—Wherever there is the relation of attorney and client existing, where correspondence is required to be produced from a person who has been employed as solicitor or agent for the defendant, the production of that correspondence cannot be insisted upon. Although the correspondence between codefendants, after the institution of a suit, is not, as a general rule, privileged from production; yet, where one defendant, being a solicitor, has acted as agent for the solicitor on the record, to collect evidence in the suit, the letters passing between him and his codefendant are privileged.²

§ 177. Waiver by client.—It is well settled that the privilege is the privilege of the client and for his benefit. He may expressly consent to the admission of the testimony, or he may expressly or tacitly waive the privilege by not claiming it. And when the attorney is called upon to testify by the client, or the latter's consent is shown, the former may be compelled to give evidence.³ And where the party examines his attorney as to

¹ *Whiting v. Barney*, 38 Barb. 393.

² *Hamilton v. Nott*, 16 Law R. Eq. 112.

³ *Wood v. Thornby*, 58 Ill. 464; *Roland v. Plummer*, 50 Ala. 182; *Riddles v. Aikin*, 29 Mo. 453; *Benjamin v. Coventry*, 19 Wend. 353; *Fossler v. Schriber*, 38 Ill. 172; *Hamilton v. People*, 29 Mich. 183; *Wilson v. Rostall*, 4 T. R. 759; *Sandford v. Remington*, 2 Ves. Jr. 189; *Herring v. Cloberry*, 1 Phill. 96; *Merle v. Moore*, R. & M. 390; *Baillie's Case*, 21 How. St. Tr. 341, 358, 408; *Lea v. Wheatley*, 20 Ibid. 574.

the communication, he waives the privilege, and upon cross-examination the attorney is bound to answer fully as to it;¹ but not unless the attorney is examined as to the communications.²

Not claiming the privilege usually amounts to a waiver.³ But there appears to be scarcely any doubt but that the court may, and perhaps should, in proper cases interpose of its own motion.⁴ The waiver is said not to be extinguished by agreement or compromise;⁵ and it is held in Massachusetts that the client becoming a witness does not alone amount to a waiver.⁶

An heir at law of the client may call upon an attorney to testify in regard to facts touching his interests, of which the attorney acquired knowledge solely from a professional consultation with the client. And it is said that counsel may be required to testify if the privilege be waived by the party who consulted him, although the interest in the subject-matter, respecting which the confidential communication was made, has passed to a third person, who objects to the disclosure.⁷

§ 178. Propositions to compromise—How far regarded as privileged.—The plaintiff may call the former attorney of the defendant to prove an offer by him on behalf of his client to settle the account, and to pay a sum of money as due to the plaintiff, and a witness may be called upon by the plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for defendant.⁸ But an offer made by the attorney of a near relation of defendant is no evidence against the defendant, and the fact of the defendant afterward employing the same attorney does not alter the case.⁹

Where the debtor, before the creditor commences his action,

¹ *Crittenden v. Strother*, 2 Cranch C. C. 464; *Mitchell's Case*, 12 Abb. 249; *King v. Barrett*, 11 Ohio St. 261.

² *Waldron v. Ward*, Style, 449; *Vaillant v. Dodemead*, 2 Atk. 524; *Bate v. Kinsey*, 1 Crompt. M. & R. 38.

³ *Walsh v. Trevannion*, 15 Sim. 577; *Hunter v. Capron*, 5 Beav. 93; *Dartmouth v. Holdsworth*, 10 Sim. 476; *Thomas v. Rawlings*, 27 Beav. 140.

⁴ *People v. Atkinson*, 40 Cal. 284; *Wharton on Evidence*, sec. 583.

⁵ *Turney v. Bailey*, 34 Beav. 105; *Hughes v. Garnons*, 6 Beav. 252.

⁶ *Montgomery v. Pickering*, 116 Mass. 231.

⁷ *Benjamin v. Coventry*, 19 Wend. 353. See *Crosby v. Berger*, 4 Edw. Ch. 254.

⁸ *Turner v. Railton*, 2 Esp. 474; *Griffith v. Davies*, 5 Barn. & Adol. 502.

⁹ *Burghart v. Augerstein*, 3 Car. & P. 690.

employs an attorney to make propositions to the creditor upon the matters in difference between them, the attorney cannot be examined as to what the debtor said upon the occasion, for this is to be considered as a privileged communication between attorney and client; but what the attorney said when he made the propositions to the creditor is admissible against the debtor, even without further proof of authority than the fact of the attorneyship for the debtor.¹ Letters from a party proposing a compromise are not privileged communications if tendered as evidence that the compromise has actually been effected.² Statements, however, made by an attorney's clerk to the attorney for the opposite party, if made with the object and wish of effecting a compromise, are privileged, as being a negotiation to bring about a compromise.³ An offer to accept a given sum in payment of a claim, on condition that the amount of the claim is not to be questioned, is not a negotiation for a compromise, and therefore is admissible.⁴

§ 179. Information received extra professionally.—"If it should be held that a lawyer's lips are sealed as to all matters which he heard professionally, though he had at the same time extra professional knowledge of the same subject-matter, then all that would be necessary, in order to preclude a lawyer from rendering adverse testimony in a case, would be for the party to be injured by such testimony to communicate the same facts to the lawyer in professional confidence. Such a result, however, could not be tolerated, and for this and other reasons it has been held that privilege in this relation does not extend to information a lawyer has received from others than his client, though his client may have given the same information.⁵ Peculiarly is this the case when the information was received by the attorney when

¹ *Gainsford v. Grammar*, 2 Camp. 9.

² *Collier v. Nokes*, 2 Car. & K. 1012.

³ *Jardine v. Sheridan*, 2 Car. & P. 24. See *Patch v. Lyon*, 9 Q. B. 147; 15 Law J. Q. B. 193.

⁴ *Burchall v. Spottis*, 3 Car. & K. 302.

⁵ *Wharton on Evidence*, sec. 588; *Marsh v. Keith*, 1 Drew. & S. 342; *Davies v. Waters*, 9 Mees. & W. 611; *Lewis v. Pennington*, 20 Law J. Ch. 670; *Follett v. Jefferyes*, 1 Sim. N. S. 3, 17; *Mackenzie v. Yeo*, 2 Curt. 866; *Greenough v. Gaskell*, 1 Mylne & K. 104; *Crosby v. Berger*, 11 Paige, 377; *Chillicothe R. R. v. Jameson*, 48 Ill. 281; *Howard v. Copley*, 20 La. An. 504. See, also, *Davies v. Waters*, 9 Mees. & W. 608; *People v. Atkinson*, 40 Cal. 284.

acting as a party with a joint interest with the client, and not as his professional adviser, or when the knowledge was received in the progress of a trial.”¹

“It has also been held that privilege does not protect statements made by client to counsel for the purpose of obtaining information as to matters of fact as distinguished from matters of law, or statements made to the counsel in the presence of third parties, such parties not being concerned in a confidential consultation, or statements made to counsel in order to induce him to believe that the cause is one he can undertake without breach of duty to another client.”²

The right of an attorney, then, to refuse to disclose matters with which he has become acquainted in the course of his employment as such, does not extend to matters of fact which he knows by any other means than confidential communication with his client, though if he had not been employed as attorney he might not have known them. To illustrate: An attorney is bound to answer on a trial whether a particular document belonging to his client is in his possession, and is then in court.³

And so where a person devised real property to his widow for life, and after her death to his children equally, with a power to the widow to mortgage or sell, in case the fund arising from the real and personal estate of the testator was not sufficient for her maintenance, the widow executed a mortgage of the property for £30 to her son, and it was proved that four years before the mortgage the son advanced his mother a sum less than £1 to pay a poor's-rate that she was unable to pay. The subscribing witness to the mortgage-deed had acted as attorney both of the widow and her son respecting it. The court held that, on the trial of an ejectment by the administratrix of the son, to recover the property under the deed, the subscribing witness might be cross-examined to show that the sum of £30 mentioned in the deed, and in the receipt at the back of it, was never, in fact, advanced.⁴

¹ *Duffin v. Smith*, Pea. R. 108; *Rochester v. Bank*, 5 How. Pr. 259; *Brown v. Foster*, 1 Hurl. & N. 736.

² *Wharton on Evidence*, sec. 588; *Bramwell v. Lucas*, 2 Barn. & C. 743; *Desborough v. Rawlins*, 3 Mylne & C. 515; *Sawyer v. Birchmore*, 3 Mylne & K. 572; *Allen v. Harrison*, 30 Vt. 219; *Goddard v. Gardner*, 28 Conn. 172; *Hoy v. Morris*, 13 Gray, 519; *Heaton v. Findlay*, 12 Pa. 304.

³ *Dwyer v. Collins*, 7 Ex. 639; 16 Jur. 569; 21 Law J. Ex. 225.

⁴ *Salt v. Carr*, Car. & M. 123.

§ 180. Information not in the scope of professional duty is not privileged.—The subject must be within the peculiar scope of the lawyer's duty and profession. A lawyer may therefore be called upon to identify his client, to prove that client's handwriting, to declare whether certain writings are in his possession, so as to let in secondary evidence, and to divulge statements made to him by his client, when such statements are simply casual observations, having nothing to do with any legal question as to which the lawyer is consulted.¹

The condition of the client's mind when he consults the lawyer, when such condition is patent to all other observers, is not privileged, nor is the question whether the lawyer was retained by the client, and in what capacity.²

§ 181. The rule in criminal cases.—An attorney in a criminal case is bound by the same rules as to confidential communications as in civil proceedings. He cannot be compelled, and ought not to disclose anything in evidence against his client, either before the grand jury or the court, which has been communicated to him in the course of his employment as the professional adviser of the party, in that or any other judicial investigation.³ Nor can he be compelled to produce documents delivered to him in confidence by his client, for the purpose of criminating the latter;⁴ but the attorney should be satisfied that

¹ Wharton on Evidence, sec. 589; *Carpmael v. Powis*, 1 Phill. 687; *Bramwell v. Lucas*, 2 Barn. & C. 86, 745; *Brown v. Foster*, 1 Hurl. & N. 736; *Rex v. Leveson*, 11 Cox C. C. 152; *Goodall v. Little*, 20 Law J. Ch. 132; 1 Sim. N. S. 135; *Wheatley v. Williams*, 1 Mees. & W. 533; *Desborough v. Rawlins*, 3 Mylne & C. 515; *Jones v. Goodrich*, 5 Moore P. C. C. 16; *Smith v. Daniel*, Law R. 18 Eq. 649; *Clark v. Richards*, 3 E. D. Smith, 89; *Pierson v. Steertz*, Morris, 136; *Studdy v. Sanders*, 2 Dowl. & R. 347; *Doe v. Andrews*, 2 Cowp. 846; *Hurd v. Moring*, 1 Car. & P. 372; *Johnson v. Daverne*, 19 Johns. 134; *Brown v. Jewett*, 120 Mass. 215; *Ramsbotham v. Senior*, Law R. 8 Eq. 575; *Ex parte Campbell*, Law R. 5 Ch. Appeals, 703; *Gillard v. Bates*, 6 Mees. & W. 547; *Annesley v. Anglesea*, 11 How. St. Tr. 1220. Perhaps, however, he cannot be compelled to disclose his client's address, (*Heath v. Creelock*, Law R. 15 Eq. 257. But see *Studdy v. Sanders*, 2 Dowl. & R. 347) unless the client be a ward of the court, or in bankruptcy. *Ramsbotham v. Senior*, Law R. 8 Eq. 575; *In re Cathcart*, Law R. 5 Ch. 703.

² *Daniel v. Daniel*, 39 Penn. 191; *Beckwith v. Benner*, 6 Car. & P. 681; *Heaton v. Findlay*, 12 Penn. 304. But see *Chirac v. Reinecker*, 11 Wheat. 280; *S. C.* 2 Peters, 613.

³ *Rex v. Duchess of Kingston*, 20 How. St. Tr. 612; *Anon.* 8 Mass. 370; *State v. Squier*, 1 Tyler, 147.

⁴ *Rex v. Dixon*, 8 Burr. 1685.

he is intrusted confidentially in the first instance for a legitimate purpose, as the defense of his client. Where documents are delivered for the purpose of raising money, an attorney is not justified in impeding the course of justice by withholding them on the trial of a prosecution for the forgery.¹

Although an attorney cannot be compelled in a criminal case, any more than in any other, to disclose any matter communicated to him professionally by his client with reference to his defense, still how far the obligation to secrecy extends in cases where the attorney is in possession of any information or document which he has obtained without reference to the prosecution, has not been considered so clear.²

If there be any inability to recollect, on the part of the attorney, whether a communication is made to him confidentially and professionally or not, the benefit of the doubt should, at least in criminal cases, be given to the client, if he objects to the disclosure; as, where the attorney could not state whether certain admissions were made to him confidentially as counsel, or whether the client made them as a witness on his own behalf while under examination in court.³

§ 182. Course for attorney to pursue when subpoenaed.

The proper course, when an attorney is served with a subpoena to testify, or a *subpoena duces tecum* to produce documents, in relation to matters which he deems to be confidential, is to attend the court, the grand jury, etc., at the time and place required, and formally claim his privilege, as a confidential adviser, from affording the evidence, and the court will at once determine the question. If he takes the responsibility on himself of refusing to appear or produce the evidence required, he subjects himself to an action or an attachment.⁴ If he breaks faith with the client, and takes upon himself the responsibility of testifying, he may be prevented by the court, at the suggestion of the

¹ Reg. v. Farley, 2 Car. & K. 313; Reg. v. Hayward, Ibid. 234; Reg. v. Avery, 8 Car. & P. 596.

² 1 Phil. Ev. 149. See Rex v. Dixon, 3 Burr. 1687; Reg. v. Avery, 8 Car. & P. 596; Rex v. Tilney, 18 Law J. N. S. M. C. 36; Reg. v. Hayward, 2 Car. & K. 234; Reg. v. Farley, 2 Ibid. 313; Reg. v. Hawkins, 2 Ibid. 823.

³ People v. Atkinson, 40 Cal. 284.

⁴ Avery v. Long, 9 East, 481; Reg. v. Carey, 7 Q. B. 162; Wilson v. Rastall, 4 T. R. 759.

client at the time,¹ or even by injunction.² He may also be subject to an action by the client for the breach of professional confidence, and, in extreme cases, very serious responsibility may be incurred.³ Of course the client may waive the privilege, as it belongs to him.⁴

¹ *Goodlight v. Bridge*, Lofft, 27; 7 Johns. Ch. 25; 2 Cowen, 195.

² *Cholmondeley v. Clinton*, 19 Ves. 267.

³ *Cholmondeley v. Clinton. supra.*

⁴ *Merle v. Moore*, Ryan & M. 390; 2 Car. & P. 275.

A. & C.—21.

CHAPTER IX.

RETAINER, AND AUTHORITY TO APPEAR—APPEARANCE.

I.—RETAINER.

- § 183. Commencement of the professional relation.
- § 184. The right to counsel.
- § 185. Establishing the relation of attorney and client.
- § 186. The retainer—written or parol.
- § 187. Contract of retainer.
- § 188. General and special employment.
- § 189. Retainer by one as agent for another.
- § 190. Retainer by corporations.
- § 191. Effect of dissolution of partnership on retainer.
- § 192. Effect of death of party on retainer.

II.—AUTHORITY TO APPEAR—APPEARANCE.

- § 193. Ancient mode of appearance.
- § 194. Appearance at the civil law.
- § 195. General license by reason of admission.
- § 196. Presumption of authority to appear.
- § 197. Adverse party may presume authority.
- § 198. Denial of authority—requiring its production.
- § 199. Effect of authorized appearance.
- § 200. Unauthorized appearance—dismissal of suit.
- § 201. Judgments obtained through unauthorized appearance.
- § 202. Interference with judgment by Court of Equity.
- § 203. Collateral attack.
- § 204. Unauthorized appearance—foreign and domestic judgments.
- § 205. Effect of unauthorized appearance on innocent third parties.
- § 206. Question of attorney's pecuniary responsibility.
- § 207. Laches.
- § 208. Appearance for a portion of several parties or for all parties.
- § 209. Appearance for a partnership.
- § 210. Appearance by attorney in appellate courts.
- § 211. Defendant's remedy against attorney.
- § 212. Remedy of the party whose name is used.
- § 213. Withdrawal of appearance.
- § 214. Practice.

§ 183. Commencement of the professional relation.—

The result of a desire on the part of the client to employ an attorney in and about his business or litigation, and of a corresponding consent on the part of the attorney to act for the client

in a professional capacity, is the retainer¹ of the attorney, either express or implied, by the party, from which time the professional relation is established. This will lead to a consideration of the general right to appear by counsel; the ancient mode of appearance by attorney; the retainer and the contract of retainer; the presumptions in favor of the attorney's right to appear; the denial and impeachment of that authority; laches on the part of the supposed client, and the effect of an unauthorized appearance.

§ 184. The right to counsel.—In England, the right to professional aid has been often denied when it has been most needed and most loudly demanded. In civil causes and on the trial of charges of misdemeanor the parties were entitled to the aid of counsel in eliciting the facts and presenting them and the law to the court and jury; but when the government charged a person with treason or felony he was for a long period in English history denied that privilege. Persons ignorant and unaccustomed to public assemblies, perhaps feeble in body or in intellect, or in both, were put upon trial on charges which might consign them to the most ignominious death, with able counsel opposed, and all the machinery of the law in active operation against them, and yet refused this right. Imprisoned immediately on being apprehended, they had little opportunity to prepare their defenses, even had they possessed the ability to cope with their formidable adversaries. In the case of Sir William Parkins, tried for high treason before Lord Holt and his associates in 1695, after the Statute 7 William III, chap. 3, allowing counsel to prisoners indicted for treason had been passed, the accused claimed the privilege. He cited the preamble to the statute to the effect that such an allowance was just and reasonable. But his prayer was denied, on the ground that the day of trial was, although subsequent to the passage of the statute, yet *one day before* the date of its taking effect. Lord Holt declared that he must administer the law as he found it, and

¹ In some localities, the word "retainer" is used as synonymous with the words "retaining fee," which matter will be treated of in the chapter on "Compensation."

Retainer is the act of a client by which he engages a lawyer or counsellor to manage his cause. (Bouv. Dic.)

could not anticipate the operation of an act of Parliament for a single day. The accused was convicted and executed.¹

Only such legal questions as the accused himself could suggest, was counsel allowed to argue for him. Only after the revolution of 1688 was a full defense allowed on trials for treason; and the privilege was not extended to persons accused of other felonies until as late as 1836.² The objection to extending the privilege, or rather the apology for its denial, was the fiction that the judge was counsel for the prisoner. When such judges as Jeffreys were acting as *ex-officio* "counsel for the prisoner" and judges at the same time, the serio-comic character of this reason for the rule is at once apparent.³ It is a universal principle of American constitutional law that a prisoner shall be allowed a defense by counsel. If unable to employ counsel, the court generally may designate some one to defend him. Frequently the assigned counsel is paid by the government of the locality; but when he is not, it is generally conceded that it is the duty of the counsel not to refuse his aid; and in case of refusal, that the court is authorized to compel action.⁴ The counsel should have free access to the prisoner at all reasonable hours. And it seems that where counsel fails to appear at the trial, without the connivance of the accused, the latter is entitled to a postponement of the case, for the purpose of obtaining other assistance. What is a reasonable time for such postponement depends upon circumstances, and should be regulated by the court in the exercise of a sound discretion.⁵

Having once engaged in a cause, counsel is not at liberty to withdraw from it without the consent of his client and of the

¹ See Lieber's Hermeneutics, chap. 4, sec. 15; Sedgwick on Statute and Constitutional Law, 81; Cooley's Const. Lim. *330.

² 6 and 7 Wm. IV, chap. 114; 4 Cooley's Blackst. Com. 355; May's Const. Hist. chap. 18; Cooley's Const. Lim. *332; 4 Macaulay's Hist. Eng. chap. 21; Article by Sydney Smith, 45 Edinb. Rev. p. 74; Works, vol. 2, p. 353.

³ See, also, Trials of Robert Tucker and Others for Piracy, in Charleston, S. C., in 1718, before C. J. Trott, 6 Hargrave's State Trials, 156.

⁴ Vise v. Hamilton Co., 19 Ill. 18.

⁵ State v. Ferris, 16 La. An. 424. But see State v. Romero, 5 Ibid. 24; State v. Bradley, 6 Ibid. 556; and People v. Moice, 15 Cal. 331. As to the right to be compensated when so assigned, it has been held that, in the absence of express statutory provisions, counties are not obliged to compensate counsel for the defense of poor prisoners. (Bacon v. Wayne Co., 1 Mich. 461.) But there are other cases to the contrary. (Webb v. Baird, 6 Ind. 13; Hall v. Washington Co., 2 Greene Iowa, 473; Carpenter v. Dane Co., 9 Wis. 277.)

court; and even though he may be impressed with a belief in his client's guilt, it is nevertheless his duty to see that a conviction is not secured contrary to law. The worst criminal is entitled to be judged by the laws; and if his conviction is secured by means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than total escape from punishment.¹

The statutes which conferred the right of appearing by attorney did not supersede the necessity of a personal appearance in criminal cases.² In England, however, in indictments or informations in the Court of Queen's Bench for offenses less than felony, the personal appearance of the defendant during the progress of the proceedings has for a long period been dispensed with,³ it not being deemed necessary for him in such cases to stand at the bar or plead *ore tenus*,⁴ and the pleadings may now, on the face of them, purport to be by attorney instead of the ancient form of pleading by clerk in court.⁵ In some instances parties are permitted to appear by attorney in these cases who could not do so in civil suits, as infants, and the attorney appears to have as extensive a power as in an ordinary action.⁶

In civil causes, however, appearances by attorney during the conduct of a cause have been allowed from very early times. They are mentioned in Glanville, Bracton, Fleta, and Britton; and a case turning upon a party's right to appear by attorney is reported in the Year Book 17 Edw. III, p. 8, Case 23. In France, such appearances were first allowed by letters-patent of Philip le Bel, A. D. 1290.⁷ In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of the courts, respectively, shall be permitted to manage and conduct causes therein.⁸

¹ Cooley's Const. Lim. *335.

² Mar. 113, pl. 190; Anon. 11 Mod. 253, pl. 5.

³ 1 Chit. Cr. Law, 416; Bacon's Case, 1 Lev. 146; Lyer, 346*b*; Keilw. 165.

⁴ Rex v. Hales, 2 Strange, 816; Rex v. Haycock, Ibid. 1100.

⁵ 6 and 7 Vict. chap. 20, sec. 14.

⁶ Reg v. Tanner, 2 Ld. Raym. 1284. Practically, the necessity of personal attendance during the proceedings consequent on prosecutions for misdemeanors is commonly dispensed with, if the mere form of a personal appearance has been once gone through.

⁷ 1 Fournel, Hist. des Avocats, 42, 3; 92, 3; 2 Loisel, Coutumes, 14, 15.

⁸ Act Congress Sept. 24th, 1789, sec. 35; 1 Stats. at L. 92.

§ 185. Establishing the relation of attorney and client.

—The old and technical mode of constituting the relation between client and attorney was by a power or warrant of attorney issuing from the client to the attorney. In ordinary practice, however, this formality is now rarely observed. The entering of an appearance by an attorney is accepted as an adequate voucher of his right and power to appear. It is *prima facie* proof of his authority.¹ Parties who appear for themselves may appoint attorneys at any stage of the proceeding.² It is often, however, convenient to have produced the voucher on which the attorney acts. 1st. It may be important to determine who is the actual party who is represented. 2nd. It may be possible that attorneys may misunderstand their client's instructions as to the mode of procedure. Says Lord Tenterden, to take from the client a formal written authority "is better for the attorney, because it gets rid of all difficulty about proving his retainer; and it would also be better for some clients, as it would put them on their guard, and prevent them from being drawn into lawsuits without their express direction."³

It was formerly necessary not only that the appearance by attorney but the authority or warrant of attorney itself should appear upon the pleadings. The entry of the warrant of attorney, though it came to be a mere form, was at first absolutely necessary to inform the court whether the party appeared in person or not. Previous to the Statute of Westminster 2, chap. 10, the *dedimus potestatem*, which was then necessary to enable a party to appear by attorney, was required to be entered with the officer afterward called the clerk of the warrants, and by him to be enrolled in the court. The same course was afterward adopted with the warrant of attorney; and if this were not entered, the common-law presumption prevailed, that the party appeared in person. An omission or mistake in this was sometimes held to be ground of error at common law, and sometimes not.⁴

¹ Wharton on Agency, 559; *Leslie v. Fischer*, 62 Ill. 118; *Wright v. Castle*, 3 Mer. 12; *Buckle v. Roach*, 1 Ch. 193; *Anderson v. Watson*, 3 Car. & P. 214; *Walker v. Rogan*, 1 Wis. 597.

² *Kerrison v. Wallingborough*, 5 Dowl. 565.

³ *Owen v. Ord*, 3 Car. & P. 349; *Tabran v. Horn*, 1 Man. & R. 228; 11 Johns. 466.

⁴ *Gillb.*; Com. Dig. Amendment E. 1; 41 Edw. III; *Coke v. Allen*, 8 Mod. 77; *Calverley v. Bieseley*, Dyer, 180a; *Killegrew v. Trewynard*, Dyer, 225a, 230a, 363a; *Wood v. Plant*, 1 Taunt. 45.

In the United States of America, less formality is required than in England. A written retainer, though proper, and indeed the safer and better practice, is seldom necessary, a parol retainer being sufficient¹ to authorize an attorney to commence a suit, whether in case of a corporation or an individual. And the general rule also is that where an attorney undertakes to appear for a party in a cause, a retainer will be presumed, and the court will look no further as to his authority unless it be questioned.² In the absence of fraud or collusion, the courts have proceeded, and left the party injured by an unauthorized appearance to his remedy by action.³ The attorney's authority to appear may also be inferred from circumstances, as that he was the general attorney of the defendant, and the defendant, though knowing it, did not object to his appearance. And the acceptance of service of process by an attorney of record, on behalf of his client, will, in the absence of proof to the contrary, be presumed to be authorized.⁴ Inferential authority is, therefore, generally deemed sufficient, but the presumption may be rebutted by positive proof of want of authority.⁵

The appointment of an attorney is strictly personal, and cannot usually be made by deputy, or be assumed from the mere relation of the parties, nor can an attorney appear for the tenant in possession in ejectment by order of the landlord.⁶ One executor cannot authorize an attorney to defend the other.⁷ And one partner seems to have no implied authority to retain

¹ *Manchester Bank v. Fellows*, 28 N. H. 802; *Hardin v. Ho-Yo-Po-Nubby*, 27 Miss. 567; *Hirshfield v. Landman*, 3 E. D. Smith, 208.

² *Jackson v. Stewart*, 6 Johns. 34; *Brown v. Nichols*, 42 N. Y. 26; *Hamilton v. Wright*, 37 N. Y. 502; *Proprietors v. Bishop*, 2 Vt. 231; *Post v. Haight*, 1 How. 171; *Pillsbury v. Dugan*, 9 Ohio, 117; *Hayes v. Shattuck*, 21 Cal. 51; *Williams v. Butler*, 35 Ill. 544; *Hains v. Galbraith*, 43 Ind. 309; *Henck v. Todhunter*, 7 Har. & J. 275; *Osborn v. Bank*, 9 Wheat. 738.

³ *Tally v. Reynolds*, 1 Ark. 99; *State v. Carothers*, 1 Greene, 464; *Beckley v. Newcomb*, 24 N. H. 359.

⁴ *Conrey v. Brenham*, 1 La. An. 397; *Dobbins v. Dupree*, 39 Ga. 394; *Bogardus v. Livingston*, 2 Hilt. 236.

⁵ *Dawson v. Lawley*, 4 Esp. 65; *Anderson v. Watson*, 3 Car. & P. 214; *Crook v. Wright*, Ryan & Moody, 278; *Tabram v. Horn*, 1 Moody & R. 228; *Cameron v. Baker*, 1 Car. & P. 268; *Heywood v. Fiott*, 8 Car. & P. 59.

⁶ *Doe d. Cooke v. Roe*, 1 Barnes, 39.

⁷ 9 Edw. III, chap. 3; *Elwell v. Quash*, 1 Strange, 20; *Lepard v. Vernon*, 2 Ves. & B. 54; *Bellew v. Inchledon*, 1 Roll. Abr. 929; *Williams on Executors*, 756, 1514.

an attorney to appear and *defend* for the firm.¹ But a contrary rule appears to prevail as to *suing* a debtor to the firm.² When an attorney is appointed by an agent, he represents not the agent, but the principal. If one, as the agent of another, employ an attorney for such other, it does not establish the relation of attorney and client between the agent and attorney.³ The acquiescence of a party in the retainer of an attorney in his behalf, is equivalent to a direct retainer, as where a son knew and did not disapprove of the retainer of an attorney for him by his father, and where an attorney is legally entitled to sue in the name of another, he is *de facto* empowered to appoint an attorney to do so.⁴ A codefendant may employ an attorney for other codefendants, and the appearance by such an attorney for all will bind all, and in the absence of proof to the contrary, an attorney appearing for an infant plaintiff will be presumed to have been employed by the plaintiff's guardian or next friend.⁵ As between plaintiff and defendant, the attorney is a competent witness to prove his authority.⁶

Although the license of an attorney is *prima facie* evidence of his authority to appear for any person whom he professes to represent, he may nevertheless be compelled by the court to show his authority at the instance of either party to the suit.⁷ But when the attorney's authority to appear is denied by the opposite party, the burden of proof is upon the party denying it, and he must state facts showing or tending to show that the attorney does not possess the authority which he assumes, otherwise the presumption arising from his license and appearance will prevail.⁸

It is said that two things are necessary to establish the relation between attorney and client: (1) the agreement of the at-

¹ Hambridge v. De la Crouse, 10 Jur. 1096; 8 L. T. 163; 16 Law J. Com. P. 85; 3 C. B. Rep. 742. See McCulloch v. Guetner, 1 Binn. N. S. R. 214.

² Harrison v. Jackson, 7 T. R. 207; Collett v. Hubbard, 2 P. Coop. 94.

³ Porter v. Peckham, 44 Cal. 204.

⁴ Pickford v. Ewington, 4 Dowl. 453; Cameron v. Baker, 1 Car. & P. 268.

⁵ Hilliard v. Carr, 6 Ala. 557; Abbott v. Dutton, 44 Vt. 546.

⁶ Pixley v. Butts, 2 Cowen. 421; Tullock v. Cunningham, 1 Ibid. 256; Caniff v. Myres, 15 Johns. 246; Folley v. Smith, 12 N. J. L. 140.

⁷ People v. Mariposa Co. 39 Cal. 683; Commissioners v. Purdy, 36 Barb. 266; Rogers v. Park, 4 Humph. 480; West v. Houston, 3 Har. (Del.) 15; Ninety-nine Plaintiffs v. Vanderbilt, 4 Duer, 632.

⁸ People v. Mariposa Co. 39 Cal. 683; Thomas v. Steele, 22 Wis. 207.

torney to be an attorney for the party, and (2) the agreement of the party to have the other for an attorney. The attorney, though an officer of the court, cannot generally in civil cases be compelled to appear or act for any one unless he has so undertaken or accepted a retainer.¹ If he has done this, he may be compelled to appear at the risk of an attachment, or even of being struck from the roll;² provided, it would appear that the undertaking is in writing, and signed by the attorney.³ And after having once entered an appearance for a party, an attorney is not at liberty to strike it out without leave of the court.⁴ A retainer is determined by the death of the client.⁵

§ 186. Retainer and appointment, written or parol.—

In England, it has not been necessary, since 1838, to file warrants of attorney to prosecute and defend previously to or at the time of signing interlocutory or final judgment, or at any stage of the proceedings.⁶ While the retainer need not be in writing, yet if the attorney neglects to take the precaution, and his retainer is afterward questioned, he may be compelled to bear the costs of the risk he thus undertakes.⁷

An attorney may, however, like any other agent, be appointed by parol, and a verbal retainer or authority is sufficient to support a judgment, even in case of a corporation, and although that corporation may be required to make the appointment under seal.⁸ The appearance is *prima facie* evidence of authority.⁹

¹ Salk. 87, pl. 4.

² *Lorimer v. Hollister*, 1 Strange, 693; *Anon.* 6 Mod. 42; *Kilbey v. Weyberg*, 12 Mod. 251; *Mould v. Roberts*, 4 Dowl. & R. 719; *Whitechurch v. Worthington*, Ca. Pr. 66; *Holiday v. Scott*, Ibid. 65; *Williams v. Nash*, Hardw. 131; *Bumfield v. James*, 2 Barnes, 232; *Wigg v. Rook*, 6 Mod. 86.

³ *Anon.* Lofft, 192.

⁴ *Meuzies v. Rodriguez*, 1 Price, 92. See *Anon.* 2 Chit. 415; *Hellings v. Jones*, 3 Bing. 70; *Parmeter v. Reed*, 1 W. W. & H. 575.

⁵ *Whitehead v. Lord*, 7 Exch. 691; 21 Law J. Ex. 239.

⁶ Reg. Gen. Com. Pleas, H. T. 1 Vict.; 4 Bing. B. C. 365; 5 Scott, 479; 6 D. P. C. 464.

⁷ *Wiggins v. Peppin*, 2 Beav. 403.

⁸ *Lord v. Kellett*, 2 Mylne & K. 1; *Wiggins v. Peppin*, 2 Beav. 403; *Vincent v. Bodardo*, 2 Keb. 199; *Prior v. Hale*, Style, 348; *Mayor of Thetford's Case*, 1 Salk. 192; *Reg v. Litchfield*, 16 Law T. N. S. 333; 11 Jur. 888; *Arnold v. Mayor*, 5 Scott N. S. 741; 4 Man. & G. 860; S. C. 12 Law J. N. S. C. B. 97; 2 Dowl. N. S. 574. Employment by the president of a bank is a sufficient retainer by the bank. (9 Paige, 496.)

⁹ *Osborn v. Bank*, 9 Wheat. 738; *Proprietors v. Bishop*, 2 Vt. 231; Wash. C. C. 429; *Henck v. Todhunter*, 7 Har. & J. 275; 1 Bailey, 448.

In practice, a formal authority is not often given, but a written retainer in all cases, no doubt, is the safest practice, for both attorney and client.¹ The attorney is not embarrassed in proving his retainer, and the client can always show what were the limits of his authority.

The retainer may be inferred,² but whether express or implied it should, except under very special circumstances, be from the party for whom the attorney appears.³ Having once been retained, and having once appeared upon the record, the attorney continues such, at least as regards the adverse party, until the end of the suit. There cannot be a retainer to expire in the middle of the proceedings, though, as will be seen hereafter, the client may change his attorney at almost any stage of them by consent, or by order of court. An attorney may be retained specially, as to put in bail for a prisoner, or to take out a summons for his discharge, and such special employment does not vest him with the authority to defend the action.⁴ But if the first action be defeated by an answer of non-joinder, he may, by virtue of the original retainer, commence a new action against all the parties named in the answer.⁵

The courts have sometimes refused to hear applications made on behalf of absent parties, without proof of an express author-

¹ *Owen v. Ord*, 3 Car. & P. 349. See *Tabran v. Horn*, 1 Man. & R. 228; 11 Johns. 464; *Lord v. Kellett*, 2 Mylne & K. 1.

² *Lee v. Jones*, 2 Camp. 496; *Gray v. Wainman*, 7 Moore, 467; *Hall v. Laver*, 1 Hare, 571.

³ *Chivers v. Fenn*, 2 Show. 161; *Roe v. Doe*, Barnes, 39.

⁴ *Dent v. Halifax*, 1 Taunt. 493; *Spencer v. Newton*, 6 Ad. & E. 630; 1 Nev. & P. 823.

⁵ *Crook v. Wright*, Ryan & M. 278. And an attorney who receives a note from his client to collect, is warranted by his general retainer in bringing a second suit, after being nonsuited in the first for want of due proof of the execution of the note. (*Scott v. Elmedorf*, 12 Johns. 315.) The contract of retainer is, usually, an entire contract to conduct the business to a termination, but he is not obliged to proceed with the action if his client, after reasonable notice, neglects to supply him with funds to pay expenses out of pocket. (*Wadsworth v. Marshall*, 2 C. & J. 665.) He cannot, however, abandon his client arbitrarily at any stage of the proceedings when he may choose to do so; and if he abandons the cause without giving the client reasonable notice, he will be liable in an action of damages. (*Hoby v. Buitt*, 3 B. & Ad. 350.) If his client neglect to supply him with reasonable funds after reasonable notice, he may sue for his charges up to that time; (*Vansandeau v. Browne*, 9 Bing. 402) and it is held, may end his employment by reasonable notice and recover his charges. (*Harris v. Osborn*, 2 C. & M. 632; *Nicholls v. Wilson*, 11 Mees. & W. 107.)

ity;¹ and even where an attorney acted honestly for an absent party, upon a forged authority, he was made liable for the costs.² Where any particular proceeding is but a substitution of renewal of previous proceedings, as where a fresh action is commenced after a successful plea of non-joinder, the retainer in the original action extends to the new action.³ But a retainer in one action does not entitle an attorney *de facto* to defend a cross-action.⁴ Nor is a retainer in any action sufficient to authorize any proceedings which may incidentally arise out of it.⁵

A retainer implies a promise to pay all costs rightly and properly incurred upon the retainer.⁶ Where an attorney is retained jointly by several parties to defend a suit against each, the delivery of a bill of costs to one is sufficient to entitle him to maintain a joint action against all for his costs.⁷ Two attorneys retained together, not being partners, are supposed to be entitled to compensation in equal shares, irrespective of the amount of work performed by each.⁸ When a judge orders, by consent, a consolidation of actions against several defendants who have severally employed the same attorney, upon their undertaking to be bound by the event of the trial of one, the order to consolidate operates as a joint retainer by the defendants of the attorney, and they are jointly liable to him for the costs of the action which is tried.⁹ A *prochein ami* is liable for costs on retaining an attorney, even though he does not further interfere, and the attorney receives his instructions from third parties, unless the next friend displaces this *prima facie* liability by clear proof that

¹ *Plunkett v. Buchanan*, 3 Barn. & C. 736; *Lewis v. Tankerville*, 11 Mees. & W. 109.

² *Davies v. Eyton*, 3 Barn. & Ad. 785. *

³ *Crook v. Wright*, R. & M. 278.

⁴ ——— *v. Lewis*, 3 Law J. Ex. 212; *Parmeter v. Reed*, 1 W. W. & H. 575.

⁵ *Noble v. Bank*, 3 Marsh. (Ky.) 263. See *Jent v. Halifax*, 1 Taunt. 493; *Spencer v. Newton*, 6 Ad. & E. 630.

⁶ *Bolden v. Nicholay*, 3 Jur. N. S. 884.

⁷ *Oxenham v. Lemon*, 2 Dowl. & R. 461; *Finchett v. How*, 2 Camp. 276; *Crowder v. Shee*, 1 Ibid. 437.

⁸ *Robinson v. Anderson*, 28 Beav. 98; aff'd on appeal, 7 De Gex. M. & G. 239.

⁹ *Anderson v. Boynton*, 1 D. & L. 25; 13 Q. B. 308; 14 Jur. 14; 19 Law J. Q. B. 42. See, also, as to retainer, *Dawson v. Lawley*, 4 Esp. 65; *Anderson v. Watson*, 3 Car. & P. 214; *Bright v. Legerton*, 2 De Gex. F. & J. 603; 7 Jur. N. S. 559; 30 Law J. Ch. 338; *Gregg v. Slater*, 22 Beav. 314; 2 Jur. N. S. 246; 25 Law J. Ch. 440.

the attorney acted on the credit of other persons.¹ Where an infant, suing by *prochein ami*, has obtained judgment for damages and costs, which have been paid to the attorney appointed by the next friend to conduct the suit for him, he may maintain an action against the attorney to recover the amount, as money received for his use.²

§. 187. The contract of retainer may be made like any other; it may be express or implied. When services are rendered under such circumstances as reasonably imply that they were performed with the assent and on the request of a party, he must be held liable. Where an attorney for a divorced wife prepared a written contract, at the request of the husband, creating a lien on the real estate of the former husband, to secure the payment of money to the wife, it was held that, in the absence of any understanding on the subject, the contract should be prepared at the expense of the party whose lands were to become incumbered by it; and that, although the attorney was acting in respect to the subject-matter of the agreement as the attorney of the divorced wife, yet his relations to her did not prohibit him from preparing the contract at the instance of the other party. For on this service the husband was liable to compensate the attorney.³ A woman delivered papers to an attorney, telling him she was entitled to an estate, and that she would pay him if she recovered it. The attorney took the papers, saying that "he would do what he could for her," and without further communication commenced an action of ejectment, and afterward abandoned it, under the conviction that she had no title. The court held that the attorney acted without sufficient authority, both in commencing and discontinuing the action, and was not entitled to recover the costs incurred.⁴ A proposed mortgagee's solicitor has no claim for his charges against the proposed mortgagor; where the negotiation for the mortgage goes off through the fault of the latter, he must look to the

¹ *Hawkes v. Cottrell*, 3 Hurl. & N. 243; 27 Law J. Ex. 369.

² *Collins v. Brook*, 5 Hurl. & N. 700; 29 Law J. Ex. 255; *Brook v. Collins*, 6 Jur. N. S. 999.

³ *Cooper & Moss v. Hamilton*, 52 Ill. 119.

⁴ *Tabran v. Horn*, 1 Man. & R. 228.

person who retains him, leaving him to his remedy against the party who occasioned the fruitless expenses.¹

§ 188. General or special employment.—An appointment of a person as “permanent solicitor” or attorney does not necessarily mean an appointment for life. The word “permanent,” in a resolution of the directors of a corporation, appointing one permanent solicitor to the institution, means no more than a general employment as contradistinguished from an occasional or special employment. Such an employment will not prevent a discharge of the attorney unless some special time is mentioned in the contract. But if the agreement is that the attorney shall receive a stated amount per year for his services, the contract is good for at least a year, and it seems he cannot be discharged before that time.² The employment of an attorney to do a mere ministerial act, such as procuring the execution of a deed, does not so constitute him an agent as to affect his client with constructive notice of matters within the knowledge of the attorneys.³

§ 189. Retainer by one as agent for another.—If one as the agent of another employ an attorney for such other, it does not establish the relation of attorney and client between the agent and attorney. Thus, if a party owning an undivided interest in land employs an attorney to act for him in relation to his interest in a partition suit, and at the same time, as the agent of another party owning an undivided interest, employs the same attorney to act for that other party in relation to his interest, the relation of attorney and client does not exist between the employer and attorney as to the interest of the party for whom the employer acted as agent.⁴

§ 190. Retainer by corporations.—There are old cases which hold that the retainer or employment of attorneys by a corporation should be under the corporate seal; and in cases

¹ *Wilkinson v. Grant*, 18 Com. B. 319; 25 Law J. Com. P. 233.

² *Elderton v. Emmens*, 4 Com. B. 479; 11 Jur. 612; 16 Law J. P. C. 209; S. C. (in error) 13 Com. B. 495; 4 H. L. Cas. 624; 18 Jur. 21.

³ *Wyllie v. Pollen*, 32 Law J. Ch. 782; 11 Week. R. 1081.

⁴ *Porter v. Peckham*, 44 Cal. 204.

where this has not been done, attorneys have failed to recover their costs, even where the proceedings have been directed, recognized, and acknowledged by resolution of the corporation; still it seems that, under such circumstances, he may, on equitable grounds, appropriate funds in his possession to the amount of his bill.¹ But where the act of incorporation expressly gives the directors power to appoint and displace any of the officers of the company, an appointment of an attorney under such a power need not be under the corporate seal.² Other and more recent cases hold that corporations may employ counsel to prosecute or defend actions under a parol employment in a legal session, without making the same matter of record. This is the latest doctrine on the subject. But it is said that it must be done by the concurrent act of a majority of the board at a legal session.³ But it is tolerably well settled that it may be done even without a vote, by a president or other duly qualified executive officer of the corporation.⁴ As in other cases, when an attorney appears for a corporation, in court, and prosecutes or defends an action for or against the corporation, it is presumed to be done on sufficient authority, and the production of a written warrant of attorney for that purpose is not necessary.⁵

When the president of a corporation authorizes an attorney or solicitor to prosecute or defend a suit, or to commence any legal proceeding in which the corporation is interested, the attorney or solicitor will be authorized to appear for the corporation, and such corporation will be bound by his acts. And if the president exceed his authority in retaining counsel, the corporation must look to him for any damages sustained in consequence of such unauthorized act. By the ancient common law, corporations aggregate were considered incapable of making contracts, or of appointing agents or attorneys to do any binding acts, except by a deed or power in writing under their cor-

¹ *Arnold v. Poole*, 5 Scott N. R. 741; 2 D. N. S. 574; 4 M. & G. 860; 7 Jur. 653; 12 Law J. Com. P. 97; *Sutton v. Company*, 12 W. R. 742; 10 L. T. N. S. 411.

² *Reg. v. Cumberland*, 5 Rail. C. 332; 5 D. & L. 431; 10 Jur. 1025; 17 Law J. Q. B. 102. See *Reg. v. Lichfield*, 10 Q. B. 534; 11 Jur. 888; 16 Law J. Q. B. 333; *Lewis v. Rochester*, 9 Com. B. N. S. 401; 7 Jur. N. S. 680; 30 Law J. Com. P. 169; 9 W. R. 100; 3 L. T. N. S. 300.

³ *McCabe v. Board*, 46 Ind. 380; *Manchester Bank v. Fellows*, 28 N. H. 302.

⁴ *Osborn v. Bank*, 9 Wheat. 738.

⁵ *Schroudenbeck v. Phoenix Ins. Co.* 15 Wis. 632.

porate seal. But the existing law on the subject is, that a corporation may be bound by the acts of its agents, although not under its corporate seal, and even where they are not reduced to writing; except in those cases where, by the provisions of the Statute of Frauds or otherwise, a contract must be in writing to render it valid, if made by a private person. And the acts and assent of corporations, like those of individuals, when not reduced to writing, may be inferred from other facts and circumstances.¹

§ 191. Effect of dissolution of partnership on retainer.

If attorneys, who are copartners, accept a retainer, the contract is joint, and continues to the termination of the suit, and neither can be released from the obligation or responsibilities assumed, either by a dissolution of their firm, or by any other act or agreement between themselves. Whatever is done by either in the defense of the suit, after the dissolution, is done under the contract of retainer previously made. A dissolution of a partnership subsisting between attorneys, has reference to new business to be undertaken, and does not affect engagements already made, at least so far as their clients are concerned, and the same remark may be made as to the formation of partnerships among attorneys. The Statute of Limitations does not commence running against attorneys till the service contracted for has been performed by a termination of the suit, or the contract has in some other mode been determined.²

§ 192. Effect of death of party on retainer.—The authority of an attorney to commence and prosecute a suit is revoked by the death of the constituent, and he has no authority, without a new retainer, to appear in the suit for the constituent's executor or administrator.³

§ 193. Ancient mode of appearance by attorney.—By the common law, the parties could not appear by attorney in any

¹*American Ins Co. v. Oakley*, 9 Paige, 500; *Perkins v. Company*, 4 Cowen, 645; *Field v. Proprietors*, 1 Cush. 11.

²*Walker v. Goodrich*, 16 Ill. 341; *Whitehead v. Lard*, 11 Eng. Law & Eq. 587; *Foster v. Jack*, 4 Watts. 334; *Harris v. Osborn*, 2 Crompt. & M. 629.

³*Gleason v. Dodd*, 4 Met. 333; *Palmer v. Reiffenstein*, 1 Man. & G. 94; *Shorman v. Allen*, *Ibid.* 96.

action, real, personal, or mixed, without the king's special warrant by writ or letters-patent; but was obliged to follow his suit in person.¹ This, however, must be understood of *appearance* by attorney, and not to the conduct of the suit by attorney, *after appearance once made*; for long prior to the Statute 13 Edw. I, (by which parties were first allowed to appear by attorney) and even in the time of Glanville, a party might, upon appearance first made by himself in person, appoint a *responsalis*, (whose office was similar to that of an attorney) to represent him during the subsequent progress of the cause.² Glanville says:³ "In suits concerning the right and propriety and some

¹ Co. Lit. 128a; 3 Blackst. Com. 25; Beecher's Case, 6 Co. 58; Paige v. Tulse, 2 Mod. 8.

² Stephen on Pleading, App. N. 5.

³ De Legibus, lib. 11, chap. 1. The actions which were commenced originally in the *curia regis*, and which were called *actiones de proprietate*, might be attended by the parties themselves, or by their attorneys.

The word used by Glanville is *responsalis*; and, from terms used in Bracton and Fleta, it has been supposed that an attorney, an *essoiner*, and a *responsalis* differed in some respects. (Bracton, 212b; Fleta, lib. vi, chap. 11, b. 7; Co. Litt. 128a.) The precise distinctions are not now ascertainable with certainty. The term used in the civil law for attorney would probably be *procurator*; but that is a general phrase; and the term *responsalis* is used in Justinian's *Noelle* in the sense of an officer sent with a special commission, and Glanville is speaking, of the special function of representation in a court and in a particular suit. Appearance used to be personal; and among the "abuses" specified in the "Mirror," is that appearance or answer by attorney was allowed. (Mirror, chap. 5, sec. 1; Art. 138, 102, 103, 104, 100.) Still, it is manifest that attorneys did appear in court; and for some reasons they seem to have been different from *essoiners*. A person, when he appointed a *responsalis*, was obliged to be present and make the appointment in open court, before the justices sitting there upon the bench, and no attorney could be received otherwise than from the principal then in court; though it was not necessary that the adverse party should be present at the time, nor even the attorney, provided he was known to the court. One person might be appointed attorney, or two, jointly or severally, so that if one was not present to act, another could be; and by such an attorney a plea might be commenced and determined, whether by judgment or final concord, as effectually as by the principal himself. It was not enough that any one was appointed bailiff or steward for the management of another's estate and affairs, to entitle him to be received as his attorney in court; but he must have a special authority for that particular purpose, to act in that particular cause, *ad lucrandum vel perdendum*, for him in his stead. It was the practice to appoint in the *curia regis* an attorney to act in a cause depending in some other court, and there then issued a writ commanding the person appointed to be received as such. A father might appoint his son his attorney, and so *vice versa*, and a wife might appoint a husband. Abbots and priors of canons regular used to be received as attorneys for their societies, as, of course, without letters from their convents; other priors, whether of canons or monks, if they were cloistered, even though they were aliens, were never received in court without letters from their abbot or chief prior. (Glanv. lib. 11, chaps. 1, 2, 3; 1 Reeves' History of English Law, by Finlason, 217.)

other pleas, the party might prosecute either by himself or his attorney (*responsalis*). The appointment was made by the party personally in court, and usually before the justices of the Common Pleas. He might appoint one or more; if more than one was appointed, such appointment might be to act jointly or severally. The appointment was for the particular action only; and after appointment the attorney might proceed till the suit was determined as fully and effectually as the principal himself. The party might also appear in the *curia regis*, and appoint another to act for him in a suit in another court; in which case a writ was directed to the person presiding in such court, commanding him to admit the person appointed in the place of the party in such plea, *ad lucrandum vel perdendum*."

In the Exchequer, accountants were generally obliged to personally render their accounts. If they made an attorney to account for them, it was usual to have the king's leave for it. Sometimes the accountant nominated the attorney before the king, and thereupon the king by his writ commanded the treasurer and barons to admit such person as attorney accordingly. But sometimes the accountant's attorney was admitted by warrant or leave of the treasurer, chancellor of the exchequer, or barons, or one of them.¹ Probably, in most civil suits, a party might appear in the *curia regis* and personally nominate his attorney in the particular suit; but in cases where it was inconvenient for the party to appear in court, it was necessary to have a special warrant from the king.²

Afterward, by various statutes, the right to appear by attorney was recognized. But a party might still sue or defend in person, and the right to prosecute or defend by attorney was a mere privilege, intended for the convenience and benefit of suitors.³ If the attorney appeared without authority, the party was frequently left, by the old cases, to his remedy against the attorney by action.

¹ Maddox, Exch. chap. 23, sec. 35.

² 1 Reeves' History of English Law, 169; F. N. B. 253; Com. Dig. Att'y B. 4.

³ 3 Blackst. Com. 25; Thompson v. Blackburn, 1 Nev. & M. 271; Vincent v. Bodurdo, 2 Keb. 199; Glanville, lib. 11, chap. 1; Anon. 1 Salk. 86, 88; 1 Keb. 89; Alleley v. Colley, Cro. Jac. 695; Lorymer v. Hollister, 1 Strange, 693; McCullough v. Guetner, 1 Binn. 214, 469.

In the earlier stages of the law, attorneys were appointed orally in court. Afterward, when they were allowed to be appointed by warrant out of court, the practice of the court was to require the warrant to be filed, which might, however, be done at any time before judgment, and the want of it in the record was aided by statute, and could not be assigned for error.¹ This strictness was gradually relaxed, and now, although an attorney cannot, without special authority, admit service of jurisdictional process upon his client, yet it has been presumed in collateral proceedings, and on appeal or in error, that a regular attorney at law, who appeared for a defendant, though not served, had authority to do so.² So, in order to enable a party who has been represented by an unauthorized attorney to be relieved, he must negative the presumption of authority.

The inconvenience of personal appearance was remedied by several ancient statutes.³ The first statute relative to attorneys at law appears to be the Statute of Westminster 2,⁴ which enacted that persons impleaded before the justices at Westminster, or in the King's Bench, or before the justices assigned to take the assizes, or in any county before sheriffs, or in any court-baron, may make a general attorney in all pleas, to sue for them in all pleas moved *for or against them* during the circuit, until the

¹ The following report is of a case in the time of Charles II, Court of King's Bench: "On the motion of Stroud, to file some warrants of attorney. after the attorney's death, viz., of Broome, which being after a writ of error brought, the court doubted, without there once were an actual warrant entered before judgment, and this, per Keeling, C. J., was the rule of C. B. in his time on 22 Henry VIII, chap. 30; but albeit, the old books say, an attorney may be made by writ, or by deed, and may continually be demanded in court, yet the practice generally of late is only on parol retainer, and to enter the warrant at any time, as well after judgment as before, but then the court will leave Master Paget the *Custos Brevium* to sue upon the statute, if the warrants be not actually filed in some time before issue, and brought into the office in convenient time." (*Vincent v. Bodurdo*, 2 Keb. 199.) If an attorney without warrant appear, this is a good appearance as to the court. (1 Keb. 89.)

² *Lagood v. Patterson*, 1 Blackf. 327; *Harshey v. Blackmarr*, 20 Iowa, 172; *Hill v. Ross*, 3 Dall. 331; *Osborn v. Bank*, 9 Wheat. 738; *Hare & Wall*, notes to *Mills v. Duryee*, 2 Am. Leading Cases; *Prince v. Griffin*, 16 Iowa, 552; *Masterson v. LeClaire*, 4 Minn. 163; *Shelton v. Tiffin*, 6 How. U. S. 163; *Thomas v. Steele*, 22 Wis. 207; *Fowler v. Morrill*, 8 Tex. 153; *Shroudenbeck v. Company*, 22 Wis. 207.

³ 20 Henry III, chap. 10 (Stat. of Merton); 3 Edw. I, Stat. 1, chap. 42; 6 Edw. I, chap. 8 (Stat. of Gloucester); 1 Reeves' History of English Law, 169; Crabbs' History of English Law, p. 114.

⁴ 13 Edw. I, chap. 10.

pleas be determined, or that his master remove him. Succeeding statutes enabled persons to appear by attorney in writs of *præmunire* as in other writs and complaints, which was gradually extended to tenants in *novel disseisin*,¹ to appellants in an appeal of murder "when battle lies not";² to persons outlawed and waived by erroneous process of law, and unable by reason of infirmity to come personally before the "king in his bench";³ to every natural-born subjectailable by law in suits or informations on penal statutes;⁴ to all persons outlawed for any cause, (except for treason or felony) to reverse an outlawry.⁵

The general effect of these statutes was that in all actions, real, personal, and mixed, the demandant or plaintiff, tenant or defendant, might appear by attorney;⁶ and also on indictments and informations on penal statutes, and on misdemeanors generally, for crimes less than felony, the party indicted or informed against might appear and plead by attorney.⁷ But in cases amounting to treason or felony, and in all cases where parties were in contempt, they must appear and plead personally.⁸

Parties are not generally prevented from suing and defending in person if they choose.⁹ To this, however, there are some exceptions, as corporations aggregate are incapable of appearing in person, and must appear by attorney.¹⁰

We have thus seen that attorneys were anciently appointed orally in open court, then out of court by warrant, but the present practice is, for the most part, to have them appointed out of court, with or without warrant.¹¹ The appearance, however, by attorney, instead of the appearance of the party personally, must appear in some way upon the record, the party being pre-

¹ 7 Rich. II, chap. 14; 12 Edw. II, Stat. 1, chap. 1.

² 3 Henry VII, chap. 1.

³ 7 Henry IV, chap. 13.

⁴ 29 Eliz. chap. 5, sec. 21; amended by 31 Eliz. chap. 10, sec. 20.

⁵ 4 and 5 Wm. & M. chap. 18, sec. 3.

⁶ Com. Dig. Atty. B. 5.

⁷ 1 Roll. Abr. Attorney, 289, l. 10; 2 Hale, 216; Com. Dig. Attorney, B. 5; Bac. Abr. Attorney, B. 1; Chit. Cr. Law, 411.

⁸ Br. Abr. Attorney, pl. 63, 69, 81, 101; Com. Dig. Attorney, B. 6.

⁹ 3 Blackst. Com. 25; *La Grue v. Benny*, 2 H. Black. 600; *Uppendale v. Lightfoot*, Sayers, 117; *Ward v. Nethercoate*, 7 Taunt. 145.

¹⁰ Co. Litt. 66. In *re Sutter, Hospital's Case*, 10 Coke, 326; Year Book, 19 Henry VI. chap. 80; 21 Edw. IV, 18.

¹¹ *Glanville*, lib. 11, chap. 1; *Wynne v. Wynne*, 1 Wils. 39; 2 Keb. 199.

sumed to come into court and apply to be admitted by attorney, and the courts not being bound to take judicial notice of the appointment if not entered in some way of record.¹ The usual commencement of the pleadings, "A, by B (, his attorney, complains," etc., seems now to be a sufficient entry of appearance by attorney,² and the filing of a formal warrant of attorney is, as already stated, no longer necessary.

Even in early cases it was considered sufficient that the authority to the attorney be given by writing upon the process that such a one shall be his attorney.³ And if the attorney appeared, the court did not inquire into his authority in the first instance.⁴ It was considered sufficient to say, that *A, venit per B, attornatum suum*.⁵ And now the indorsement upon the summons or writ, taken in connection with the words in the declaration or complaint, "the plaintiff, by his attorney, comes," etc., is generally sufficient. In *Osborn v. Bank of United States*, 9 Wheat. 738, the Supreme Court of the United States decided that the want of a warrant of attorney constituted no ground of reversing a decree, although a corporation was the plaintiff.⁶

§ 194. In the civil law.—By the Roman law, and the practice under it in modern Europe, a party to a suit may appear in person or by attorney (procurator). Unlike the common law, there is no presumption that the procurator has authority to represent his client. It seems to be the practice for the procurator to file his written warrant of attorney as the first step, before argument commenced. This is required by the court. And the civil law acts upon the principle that the act of two persons cannot bind or affect a third person, a stranger to the act. *Inter alios acta vel judicata aliis non nocere*. Decrees obtained or confessed by attorneys without authority would be held absolute nullities as to all persons.⁷

¹ *Hunter v. Neck*, 3 Man. & G. 183; Gilb. 187; 2 Hawks. P. C. chap. 22, sec. 6.

² *Parsons v. Gill*, 1 Salk. 88, pl. 8; 1 Leon. 9.

³ 1 Sid. 31; 1 Com. Dig. 746.

⁴ 1 Salk. 86.

⁵ 1 Com. Dig. 746.

⁶ *Farmers & Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457; *Osborn v. Bank of United States*, 9 Wheat. 738; *Hellman v. McWhennie*, 3 Rich. 364.

⁷ Code vii, lib. lx, lvi, S. P. Dr. Linde's *Lehrbuch of German Civil Proceedings*, sec. 116. In France, see *Code de Proc. Civ.* tit. xviii. Authorities cited by Van Ness, J.: 6 Johns. 314; *Ridge v. Alter*, 14 La. An. 866, 3; *Harshey v. Blackmarr*, 20 Iowa, 183.

§ 195. General license by reason of admission.—Every attorney, regularly licensed and duly admitted to practice, possesses a general license to appear in such courts as he may be admitted to, for any suitors who may retain him; but his license is not, of itself, an authority to appear for any particular person, until he is in fact employed by or retained by him or for him. But his authority to appear cannot be legally questioned until facts or circumstances are shown, by affidavit or otherwise, sufficient to raise a legal presumption of want of authority.¹ A simple allegation that a party is “informed and believes” that the attorney has no authority, without stating the facts upon which it is founded, is not sufficient to call his authority in question. An employment may be proven by circumstances and facts,² as well as by an express retainer.

It is not necessary to show authority at the outset, whether the suit be by an individual or a corporation, in order to the progress of the suit, unless it is called for by the defendant. Even when called for, the declaration by the attorney that he was employed by the plaintiff or his agent, who, he believed, was duly authorized to employ him, will ordinarily be deemed sufficient. A defendant may, however, show that the suit is prosecuted without the consent of the plaintiff on the record; and if it appear that he is the real and not the nominal plaintiff, the action will be dismissed for the want of a plaintiff in court. If he is the nominal plaintiff only, the suit might proceed. The fact that it is not affirmatively shown upon the trial that a suit is commenced by the authority of the client, is of no consequence. It is not necessary to show the authority until it is called for.³ But if a party has reason to believe that an action has been brought in the name of a legal party without his assent, and for the use of another, he may require the plaintiff to file his warrant, but it is said not after pleading and issue joined.⁴

But attorneys are the officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in its proceedings only by the license of the court; and if they undertake to appear without authority from the party whom they profess to represent, the act is an

¹ *Cartwell v. Menifee*, 2 Ark. 356. ³ *Manchester Bank v. Fellows*, 28 N. H. 302.

² *Tally v. Reynolds*, 1 Ark. 99.

⁴ *Campbell v. Galbreath*, 5 Watts. 423.

abuse of the license of the court, which, upon the application of the supposed client, the court has the power to inquire into and correct summarily. An attorney's license is *prima facie* evidence of his authority to appear for any person whom he professes to represent. The statement of an attorney that he appears even for a corporation is *prima facie* sufficient; but if the supposed client denies his authority, the court may require him to produce the evidence of his retainer. The court may also require an attorney to show special authority, upon the application of the opposite party, whenever justice requires it.¹

As the attorney is permitted, by almost universal practice in America, to do so under verbal retainer, it is only in cases of clear want of authority or abuse of his privilege that he is held to be incompetent to institute a suit, or to represent a party in court. As the presumption is in favor of his authority, though he may be required to show it, still, if he acts in good faith, and the want of authority is not manifest, he will not be held to have acted without authority, because it is not shown according to strict legal rules.²

§ 196. Presumption of authority to appear.—The authority of an attorney at law, regularly admitted and licensed, to appear for the party whom he professes to represent, is pre-

¹ Clark v. Willett, 35 Cal. 534; Turner v. Caruthers, 17 Cal. 431; McKiernan v. Patrick, 4 How. (Miss.) 333; Penobscot Corporation v. Lamson, 16 Me. 224; Bridgton v. Bennet, 23 Me. 420. See Henck v. Todhunter, 7 Har. & J. 275.

² Hardin v. Ho-yo-po-nubby's Lessee, 27 Miss. 567; Rogers v. Park's Lessee, 4 Humph. 480; McKiernan v. Patrick, 4 How. 333. The filing of a plea by an attorney, or the signing of an answer to a bill in chancery by a solicitor, though no process may have issued for the defendants, constitute an appearance, and is sufficient to authorize the rendition of a judgment or decree against them, without any proof of the authority of the attorney. (Lester v. Watkins, 41 Miss. 647.)

It devolves upon party impeaching validity to show by positive proof that it is invalid and insufficient. (Hardin v. Ho-yo-po-nubby's Lessee, 27 Miss. 579; McKiernan v. Patrick, 4 How. (Miss.) 333; Rogers v. Park's Lessee, 4 Humph. 480.)

Though the attorney may be required to show authority, yet if he acts in good faith, and the want of authority is not manifest, he will not be held to have acted without authority, because it is not shown according to strict legal rules. All that is required, in the first instance, is, that the attorney has acted in good faith and under an authority appearing to be genuine, though informal, and it devolves upon the party impeaching the authority to show by positive proof that it is invalid. (Hardin v. Ho-yo-po-nubby's Lessee, 27 Miss. 567.) See circumstances under which authority was considered insufficient. (Day v. Adams, 36 N. C. 254.)

sumed until the contrary is shown; in other words, an appearance in a suit by an attorney of the proper court is presumed to be authorized.¹ The burden of proof is upon the party denying the authority.² But, notwithstanding this, the opposite party may compel the attorney at the outset to show his authority, or produce his warrant of attorney.³ For this purpose due cause must be shown.⁴ In some States it is *prima facie* sufficient if the attorney declares that he was duly employed by the plaintiff, or that he is the party's general legal representative.⁵ The presumption as to the authority to appear extends to an appearance by attorney in an appellate court.⁶ In the absence of preponderating evidence, a power of attorney not authenticated, a letter, or parol evidence, which raises a reasonable presumption of the existence of authority, is sufficient, even when the authority to appear is questioned.⁷

It may be stated that an appearance by attorney binds *prima facie* the party for whom he appears, whether the attorney was employed by the party or not.⁸ The client may, however, have

¹ Hays v. Shattuck, 21 Cal. 51; Anderson v. Sutton, 2 Duval, 480; Tally v. Reynolds, 1 Ark. 99; Williams v. Butler, 35 Ill. 544; Succession of Patrick, 20 La. An. 204; Beckley v. Newcomb, 24 N. H. 359; Leavitt v. Wallace, 12 N. H. 489; Penobscot Co. v. Lamson, 4 Shepley, 202; Henck v. Todhunter, 7 Har. & J. 275; Munnikuyson v. Dorsett, 2 Har. & G. 374; Harris v. Galbraith, 43 Ill. 309; State v. Carothers, 1 Greene, 464; Turner v. Caruthers, 17 Cal. 431; Manchester Bank v. Fellows, 28 N. H. 302; Holmes v. Rogers, 13 Cal. 191; Jackson v. Stewart, 6 Johns. 33; Hamilton v. Wright, 37 N. Y. 502; Proprietors v. Bishop, 2 Vt. 231; Osborn v. Bank, 9 Wheat. 231; Post v. Haight, 1 How. Pr. 171; 2 Ibid. 32; Thomas v. Steele, 22 Wis. 207; Pillsbury v. Dugan, 9 Ohio, 117; Leslie v. Fischer, 62 Ill. 118; Wiggins v. Pippin, 2 Beav. 403; Emmens v. Elderton, 13 Com. B. 495; 4 H. L. Cas. 624; Republic v. DeArangoiz, 5 Duer, 643.

² Thomas v. Steele, 22 Wis. 207; Schoudenbeck v. Company, 15 Wis. 632.

³ Silkman v. Boiger, 4 E. D. Smith, 236; State v. Houston, 3 Har. (Del.) 15; Standefer v. Dowlin, Hemp. 209; Lynch v. Com. 16 Serg. & R. 358; Campbell v. Galbreath, 5 Watts, 423; Gillespie's Case, 3 Yerg. 325; O'Flynn v. Eagle, 7 Mich. 306; McAlexander v. Wright, 3 Mon. 194; Clark v. Willett, 35 Cal. 534; Knowlton v. Plantation, 14 Me. 20.

⁴ Savery v. Savery, 8 Iowa, 217; Hellman v. Whenuy, 3 Rich. S. C. 364; Barnes v. Profilet, 5 La. An. 117.

⁵ Manchester Bank v. Fellows, 28 N. H. 302; Farrington v. Wright, 1 Minn. 241; Field v. Proprietors, 1 Cush. 11; Bridgton v. Bennett, 23 Me. 420; Henck v. Todhunter, 7 Har. & J. 275; Hardin v. Ho-yo-po-nubby, 27 Miss. 567; Bogardus v. Livingston, 2 Hilt. N. Y. 236.

⁶ Ricketson v. Compton, 23 Cal. 637.

⁷ Rogers v. Park, 4 Humpl. 480.

⁸ Ferguson v. Crawford, 7 Hun. 25; Brown v. Nichols, 42 N. Y. 26; Denton v. Noyes, 6 Johns. 296; Abbott v. Dutton, 44 Vt. 546; S. C. 8 Am. R. 394; St. Albans v. Bush, 4 Vt. 58; Spaulding v. Swift, 18 Vt. 214; Newcomb v. Peck, 17 Vt. 302; Cyphert v. McClune, 22 Pa. 195. See Stevens v. Fuller, 55 N. H. 443.

a remedy for an unauthorized appearance directly against the attorney for damages, or he may make a direct application to the court which has rendered a judgment against him on the unauthorized appearance.¹ And the court may, before judgment, and in a proper case, and on a proper showing, require an attorney to exhibit his authority for bringing an action.² In England, if the authority be denied, a written warrant has been required.³ If a party denies under oath that a plea filed in his name by an attorney was filed with his authority, and the allegation is fully borne out by positive proof, the attorney's acts are not binding.⁴ But in all cases of confession of judgment, the party represented without authority, or falsely represented, should take immediate action by an application to open the judgment as soon as the facts come to his knowledge, otherwise he may be considered to be estopped by his silence.⁵

As a general rule, when a suit is commenced or defended, or any other proceeding is had therein by a regularly licensed attorney, it is not the practice to inquire into his authority to appear for his supposed client. But if the party for whom such solicitor appears or assumes to act denies his authority, and applies to the court for relief before the adverse party has acquired any rights or suffered any prejudice in consequence of the acts of the attorney, the court may correct the proceedings, and may compel the attorney who has assumed to act without authority, to pay the costs to which the parties have been subjected in consequence of his improper interference.⁶ But in cases where the adverse party has acquired rights or been subjected to costs by proceedings in the name of a party who afterward denies the authority of the attorney who has thus proceeded, courts have permitted the proceedings to stand, where the attorney is able to respond in damages, leaving the party injured by such

¹ Ibid.

² *Ninety-nine Plaintiffs v. Vanderbilt*, 4 Duer, 632; *Clark v. Holliday*, 9 Miss. 711; *Gillespie's Case*, 3 Yerg. 325; *McAlexander v. Wright*, 3 Mon. 194; *Allen v. Green*, Bail. 448; *West v. Houston*, 3 Har. (Del.) 15; *State v. Tilghman*, 6 Iowa, 496; *McKiernan v. Patrick*, 5 Miss. 333.

³ *Maires v. Maires*, 23 Eng. Law & Eq. 22; *Allen v. Bone*, 4 Beav. 493.

⁴ *Decuir v. Lejeune*, 15 La. An. 569.

⁵ *Cyphert v. McClune*, 22 Pa. 195.

⁶ *American Ins. Co. v. Oakley*, 9 Paige, 496; *Wright v. Castle*, 3 Mer. 12; *Lord v. Kellett*, 2 Mylne & K. 1.

unauthorized proceedings in his name to seek his redress against the attorney by a summary application to the court or otherwise.¹

The court will not arrest proceedings if satisfied by parol evidence of the attorney's authority.² But where it appears that process was issued by an attorney without authority, such process may be set aside on motion of the opposite party,³ or the court will stay the proceedings, and order the attorney to pay the costs.⁴ To such a rule the plaintiff should be made a party. The motion may, however, emanate from the plaintiff himself.⁵

§ 197. Adverse party may presume authority to appear.

Speaking in general terms, an appearance by attorney, whether for plaintiff or defendant, if there be no collusion, may be recognized by the adverse party as authentic and valid. Receiving their authority from the court, attorneys are deemed officers of the court. Their commissions declare them entitled to confidence, and their license is an assurance, not only of their competency, but of their character and confidence. The direct control of the courts over them as officers, by way of summary discipline and punishment, to compel the performance, or to suspend or degrade them, is retained and exercised as a guarantee of their fidelity. It is no denial of the rule that where there are special circumstances calling for its relaxation, the courts may and do relieve from its rigid application. So, when an appearance is entered by an attorney without authority, the inquiry whether

¹ *American Ins. Co. v. Oakley*, 9 Paige, 496; *Dundas v. Dutens*, 1 Ves. Jr. 196; *Denton v. Noyes*, 6 Johns. 297; *Cox v. Nichols*, 2 Yeates, 547; *Ex parte Stuckey*, 2 Cox, 283. See *Hoffmire v. Hoffmire*, 3 Edw. Ch. 173.

² *Cartwell v. Manifee*, 2 Ark. 355; *Commis v. Purdey*, 36 Barb. 266; *Boutlier v. Johnson*, 2 Browne, (Pa.) 17; *Allen v. Green*, 1 Bail. 448; *West v. Houston*, 3 Har. (Del.) 15; *Ninety-nine Plaintiffs v. Vanderbilt*, 4 Duer, 632; *Hirshfeld v. Landman*, 2 E. D. Smith, 208; *Rogers v. Park*, 4 Humph. 480; *King of Spain v. Oliver*, 2 Wash. 429; *Bush v. Miller*, 13 Barb. 481; *Bank v. Troy Bank*, 1 Doug. (Mich.) 457. See *Day v. Adams*, 63 N. C. 254.

³ *Wharton on Agency*, sec. 565; *Frye v. Calhoun Co.*, 14 Ill. 132; *Crichfield v. Porter*, 3 Ohio, 518; *Powell v. Spaulding*, 3 Iowa, 443; *Hess v. Cole*, 23 N. J. L.; 3 Zab. 116; *Handeley v. Statelov*, 6 Litt. 186; *Boykin v. Holden*, 6 La. An. 120.

⁴ *Hubbart v. Phillips*, 2 Dowl. & L. 707; 13 Mees & W. 703. See *Hammond v. Thorpe*, 1 Crompt. M. & R. 64; 2 D. P. C. 721.

⁵ *Wharton on Agency*, sec. 565; *Thatcher v. D'Aguilar*, 11 Ex. 436; *Norton v. Cooper*, 3 Smale & G. 375; *Jenkins v. Fereday*, Law Rep. 7 C. P. 338; *Reynolds v. Howell*, Law Rep. 8 Q. B. 398.

the attorney is of sufficient responsibility to answer in damages to the party injured for his unauthorized conduct has been entertained, and it is proper sometimes to inquire whether the injury to the party is irremediable, unless such appearance be set aside, and the proceedings founded thereon vacated. In the exercise of their general control over their own judgments, the courts may and do consider whether they can relieve the party for whom an unauthorized appearance is made, without undue prejudice to the party who has in good faith relied upon such appearance, and the official character of the attorney who appears. But when, pending a litigation, the authority of the attorney to appear is denied, and application is made in due season, the court, if probable cause appears, will, in general, protect the party applying.¹ Still, the general rule remains, that a retainer will be presumed when the attorney appears, and the adverse party, having no notice or ground of suspicion, may act on that presumption.²

§ 198. Denial of authority to appear—Requiring production of authority.—The attorney's authority to appear is derived from the party, and dependent on him for its continuance; and although it is not the practice of the courts, in ordinary cases, to require the attorney to produce either a warrant or other authority from the suitor, before he is permitted to appear, yet its production may be, and under certain circumstances will be, required by the court. Courts act on the presumption that the attorney is authorized by the party; and it is by virtue of this authority that he is permitted to appear and prosecute or defend, and not merely because he is an officer of the court, admitted by them, and sworn to discharge his duty. Both in England and America, the cases are numerous where parties have obtained relief against the acts of unauthorized attorneys, although the old English rule might have been otherwise. Lord Mansfield expressly states the doctrine, that a party to a suit is not bound by the act of an attorney not employed by him; and where a defendant had paid money to the attorney, who had

¹ *Ninety-nine Plaintiffs v Vanderbilt*, 4 Duer, 632; *Wright v. Castle*, 3 Mer. 12; *Lord v. Kellett*, 2 Mylne & K. 1.

² *Hamilton v. Wright*, 37 N. Y. 502; *Republic of Mexico v. De Arangoiz*, 5 Duer, 643; *Jackson v. Stewart*, 6 Johns. 33; 9 Paige, 496.

brought a former suit, and appeared for the plaintiff, he was said to be liable to pay it over again, if it appeared the attorney was not employed by the plaintiff.¹

In a case in New York, it was held that judgment obtained against the defendant, not served with process, in consequence of the appearance of an unauthorized attorney, was not conclusive upon the defendant, and the proceedings were reversed, and the party permitted to make his defense. Whatever may have been the old English rule, the practice of the English courts now seems to be not to consider the act of an attorney conclusively binding unless he is employed by the person for whom he appears, and the decisions of the courts of the United States have generally been in accord with that practice.² Especially will the plaintiff be relieved, and proceedings set aside or stayed, when it appears that the attorney is insolvent.³

"If, in defraud of the rights of a *bona fide* party, two nominal parties to a suit procure a judgment to be entered by means of a fraudulent unauthorized appearance, such judgment may be impeached collaterally, so far as concerns any persons tainted with knowledge or bound to inquire into the fraud."⁴ It has been held by the Supreme Court of the United States, that while the party against whom an unauthorized appearance has been entered, when sued on a record in which judgment has been entered against him on such attorney's appearance, may prove that the attorney had no authority to appear; yet he can do this only on a special plea, or on such plea as under systems which do not follow the common-law system of pleading is its equivalent.⁵

Notwithstanding an attorney's license is *prima facie* evidence

¹ Robson v. Eaton, 1 T. R. 62.

² Robson v. Eaton, 1 Term Rep. 62; Denton v. Noyes, 6 Johns. 298; Critchfield v. Porter, 3 Ohio, 518; Anon. 11 Ill. 488; Frye v. Calhoun Co. 14 Ill. 132; Walworth v. Henderson, 9 La. An. 339; Bell v. Ursury, 4 Litt. 334.

³ Campbell v. Bristol, 19 Wend. 101. See Meyer v. Littell, 2 Pa. 177.

⁴ Wharton on Agency, sec. 566; Beckley v. Newcomb, 24 N. H. 359; Mexico v. De Arangoiz, 5 Duer, 643; Jackson v. Stewart, 6 Johns. 34; Henck v. Todhunter, 7 Har. & J. 275; Turner v. Caruthers, 17 Cal. 431; Hayes v. Shattuck, 21 Cal. 51; Dalton v. Dalton, 33 Ga. 243; Tally v. Reynolds, 1 Ark. 99; Williams v. Butler, 35 Ill. 544; Kent v. Richards, 3 Md. Ch. 392; Nofris v. Douglas, 5 N. J. L.; 2 South. 817; Conrey v. Brenham, 1 La. An. 397; Bank of Conn. v. Bank of Buffalo, 6 Paige, 497; Fowler v. Morrill, 8 Tex. 153; Cox v. Hill, 3 Ohio, 411. See Pillsbury v. Dugan, 9 Ohio, 117.

⁵ Hill v. Mendenhall, 21 Wall. 453.

of his authority to appear for any person whom he professes to represent, he may be compelled by the court to show his authority to appear for such party, and this may be required of him at the instance of the opposite party as well as of the party for whom he appears. In order to invoke the exercise of such power, the opposite party, when he questions the authority of the attorney, must state facts showing, or tending to show, that the attorney did not possess the authority which he exercised. He must state such facts, and the grounds and reasons which induced him to believe that the attorney had no authority to appear; otherwise the *prima facie* evidence, viz., the presumptions arising from the license and the fact of the appearance, will prevail. A mere general allegation that a party is informed and believes that the attorney had no authority, is not generally deemed sufficient to overthrow the presumption.¹

In *Clark v. Willett*, 35 Cal. 534, the authority of an attorney to appear was discussed. The bill of exceptions related to the power of the inferior court to go behind the license of an attorney, and inquire as to his authority to appear for his client. The bill showed that when the case was called for trial, the defendant's attorney, appearing on behalf of one of the plaintiffs, who was present in court, moved to discontinue the case as to him, and in support of the motion presented an affidavit to the effect that the action had been brought without the affiant's consent, and against his will; that his name had been used without authority; that he was opposed to the prosecution of the action, and desired it to be discontinued as to him.

A case was cited² where certain commissioners had retained counsel to bring an action. A trial had been had, resulting in favor of the commissioners, and a new trial granted. At that stage of the case the commissioners, without substituting another attorney of record, and without the knowledge of their attorney of record, compromised the action, authorized the attorney of defendant, in writing, to appear for them and dismiss the action, which he did; but the motion was resisted by the commissioners' attorney of record, upon the ground, among others,

¹ *People v. Mariposa Co.* 39 Cal. 683; *McKiernan v. Patrick*, 4 How. (Miss.) 333.

² *Commissioner v. Younger*, 29 Cal. 147; *Clark v. Willett*, 35 Cal. 534.

that he was still the attorney of record of the commissioners, and as such entitled to manage and control the case, until displaced and another substituted of record. The inferior court dismissed the action, but the appellate court reversed the judgment, holding in effect that where a party retains an attorney to bring or defend an action, the attorney has a right to control and manage the case until he has been superseded according to the statute. The question there was, whether the court was bound to recognize the attorney of record as possessing the right to manage the case, or could at pleasure ignore him altogether, and recognize another as having that right.

But in *Clark v. Willett*¹ the question was, whether the court had the power to inquire as to the retainer of the attorney, upon the suggestion of the client that he had abused the license of the court, and brought the action without authority. The court had no doubt about the power, and held that attorneys were the officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in its proceedings only by the license of the court; and if they undertake to appear without authority from the party whom they profess to represent, the act is an abuse of the license. The court may require him to produce the evidence of his retainer under the supervisory power which it has over its process and the acts of its officers.² It has been held that the court may require an attorney to show special authority, upon the application of the opposite party, when justice requires it.³

§ 199. Effect of authorized appearance by attorney.—

A voluntary appearance by an attorney, if authorized, is as effective for the purposes of jurisdiction as an actual service of summons; and when an attorney of a court of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed. A record which shows such an appearance will bind the party until it is proven that the attorney acted without authority. And where suit is brought on a record which shows a voluntary appearance by attorney, it

¹ 35 Cal. 539.

² *Turner v. Caruthers*, 17 Cal. 431; *Clark v. Willett*, 35 Cal. 540.

³ *McKiernan v. Patrick*, 4 How. (Miss.) 333.

is not allowable, under the common-law system of pleadings, under a plea of *nul tiel record* only, to prove that the attorney had no authority to appear. Though a party may prove that the attorney had no authority to appear, yet he can do this only on a special plea, or on such plea as, under systems which do not follow the common-law system of pleading, is the equivalent of such a plea. A plea of *nul tiel record* only denies the existence of the record itself, and is met by the production of the record valid upon its face, or an exemplification duly authenticated.¹

Whenever the record shows an appearance by attorney, the presumption is that such appearance was an authorized one, especially in the absence of fraud;² and even where the record is silent as to the attorney's authority to accept service, and the record discloses such acceptance of service, the presumption of authority to accept such service will also be indulged in.³

It may be considered settled, therefore, that if the attorney is authorized to appear, the jurisdiction over the defendant is perfect, and the subsequent action of the attorney, in the absence of fraud by the adverse party, is binding on the client both at law and equity. The rule that a party cannot in equity find relief from the consequence of his own negligence, or of a mistake of the law, is equally applicable where the mistake or neglect is that of his attorney employed in the management of the case.⁴

¹ *Hill v. Mendenhall*, 21 Wall. 453. See, also, *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Company*, 19 Ibid. 58; *Bimeler v. Dawson*, 4 Scam. 538; *Harrod v. Barreto*, 2 Hall, 302; *Shumway v. Stillman*, 6 Wend. 447; *Starbuck v. Murray*, 5 Ibid. 148; *Price v. Hickok*, 39 Vt. 292; *Judkins v. Company*, 37 N. H. 482; *Holt v. Alloway*, 2 Blackf. 108; *Moulin v. Company*, 4 Zab. 222; *Gilman v. Lewis*, Ibid. 248; *Aldrich v. Kinney*, 4 Conn. 380; *Eager v. Stover*, 59 Mo. 87; *Hayes v. Shattuck*, 21 Cal. 51; *Holmes v. Rogers*, 13 Cal. 191.

² *Potter v. Parsons*, 14 Iowa, 286; *Alton v. Gilmanton*, 2 N. H. 520; *Talbott v. McGee*, 4 Mon. 377; *Pike v. Emerson*, 5 N. H. 393; *Gallard v. Smart*, 6 Cowen, 385; *Buckland v. Conway*, 16 Mass. 396; *Holker v. Parker*, 7 Cranch, 436; *Williams v. Butler*, 35 Ill. 544; *Leavitt v. Wallace*, 12 N. H. 489; *Osborn v. Bank*, 9 Wheat. 830; *McCulloch v. Guetner*, 1 Binn. 214; *Anderson v. Sutton*, 2 Duval, 480.

³ Ibid.; *Prince v. Griffin*, 16 Iowa, 552. Where the record, in a case in which process has been served, recites that the parties appeared by their attorneys and agreed to the following decree, the authority of the attorneys cannot be questioned on appeal or writ of error. Consent takes away error; and a judgment by agreement or compromise cannot be impeached, unless for fraud, collusion, or like causes. (*Dunman v. Hartwell*, 9 Tex. 495.)

⁴ *Bradish v. Gee*, 1 Amb. 229; *Gifford v. Thorn*, 1 Stock. Ch. 702, 722; *Jones v. Williamson*, 5 Cold. 371; *Wynn v. Wilson*, Hemp. 698; *Chester v. Apperson*, 4 Heisk. 639; *Shricker v. Field*, 9 Iowa, 366; *Winchester v. Grosvenor*, 48 Ill. 517.

§ 200. Unauthorized appearance—Dismissal of suit on motion.—When an attorney commences a suit without authority, it is the duty of the court to dismiss the same on motion of defendant. The attorney must be actually employed for the purpose before he can represent the party in court. The relation of client and attorney must subsist between them. That relation cannot be created by the attorney alone. The suitor has a right to select his own attorney. If an attorney is required on a proper showing to produce his authority, and then fails to show it, the suit should be summarily dismissed by the court. The process of the courts is not to be issued, except at the instance of a suitor. It must be demanded by him in person or by his authorized attorney. A defendant is not bound to answer the merits of a suit commenced without authority from the plaintiff. Otherwise he might be twice compelled to litigate the same cause of action. A judgment in his favor in a suit prosecuted without authority would be no bar to a second action brought by the direction of the plaintiff.¹

In a case before the Circuit Court of the United States² for Pennsylvania, two rules were obtained by the defendant; one was for plaintiff's attorney to file his warrant of attorney. As to this first rule, Bushrod Washington, J., delivering the opinion of the Court, said: "We think that this rule must be made absolute, for it would be strange if a court, whose duty it is to superintend the conduct of its officers, should not have the power to inquire by what authority an attorney of that court undertakes to sue or to defend in the name of another; whether that other is a real or fictitious person, and whether its process is used for the purpose of vexation or fraud instead of that for which alone it is intended. The only question can be as to the time and manner of calling for the authority, and as to the remedy, which are in the discretion of the court, and ought to be adapted to the case." In this case there was a statute covering the matter. "But," he continues, "the court not deriving its right to interpose under the statute, will, at the threshold, inquire by what authority the suit is instituted; and being satisfied, either by the production of the warrant of attorney, or by

¹ *Frye v. Calhoun Co.*, 14 Ill. 132.

² *King of Spain v. Oliver*, 2 Wash. C. C. 429.

any other, even parol evidence that the attorney acts by authority, will not in a summary way arrest the proceedings."

Especially may the court in its discretion require a warrant to be produced, on proof that the attorney is proceeding without authority for the purpose of oppression, or for any other sinister purpose.¹

When the proof is called for, any proof, in the absence of other proof to overbalance it, is sufficient, such as an unauthenticated power of attorney, a letter, or any parol evidence which raises a reasonable presumption of the existence of authority.² The attorney may himself be a witness to prove his authority.³

When an attorney sues out a writ of error without the authority of the parties named as plaintiffs in the writ, the process will be dismissed, at the cost of the attorney who sued out the process.⁴ An attorney who enters an appearance in a suit without authority, is answerable for the ensuing damages for the injury he may thereby have occasioned the parties.⁵

§ 201. Judgments obtained through unauthorized appearance of attorney.—The subject of the effect of a judgment procured by the acts of an unauthorized attorney opens up one of those embarrassing questions about which few agree, upon which the most contradictory opinions are expressed with equal certainty, and which, the more it is discussed, the less settled it appears to become. Is a judgment so procured void or voidable, or absolutely conclusive? Must it be attacked directly, or can it be attacked collaterally? Is there a difference in the rule between domestic judgments and the judgments of other States, or foreign judgments? Is a sale under such a judgment to an innocent third party perfect? Does it pass title, or may it be said that the judgment-creditor has no title to pass? Does the fact of the ability of the attorney to respond pecuniarily in damages make any difference as to the right of a party

¹ *Allen v. Green*, 1 Bail. 448; *McKiernan v. Patrick*, 5 Miss. 333.

² *Rogers v. Park*, 4 Humph. 480.

³ *Hirshfield v. Landman*, 3 E. D. Smith, 208; *Scott v. Elmendorf*, 12 Johns. 317; *Tullock v. Cunningham*, 1 Cowen, 256; *Pixley v. Rutts*, 2 Cowen, 421; *Caniff v. Myers*, 15 Johns. 246.

⁴ *Anon.* 11 Ill. 448.

⁵ *Field v. Gibbs*, 1 Peters C. C. 155.

to relief, or is it a false quantity in the solution of the problem? To investigate all these questions fully would lead us too far into the law of judgments; but an attempt will be made to present those views which seem entitled to the most respect, and to state what is settled, so far as the unsatisfactory condition of the law upon the subject will enable us to do so.

“The general recital that the defendant appeared, is, even in those States where direct jurisdictional statements are regarded as conclusive, susceptible of explanation and avoidance by showing that the appearance was by an unauthorized attorney. It is also thought to involve no dispute with the record to show that the attorney, whom it states appeared, had no authority so to do.¹ In these instances, however, and others of a like kind, the courts have relied on the well-known rule that estoppels must be certain, as a reason for admitting evidence that might have been shut out by a clear and positive recital. There was said to be no direct or necessary conflict between an averment on the one part that the defendant appeared, and proof on the other that the appearance was by an attorney, who did not represent the defendant; and there has been a manifest reluctance to go beyond this, and assume the responsibility of holding that ‘an unequivocal allegation that the defendant was served personally, or entered a personal appearance, can be disproved by parol evidence.’² Nevertheless, numerous cases exist in which the authority to controvert the truth of unequivocal allegations found in the record in regard to jurisdiction, is affirmed in express terms or by necessary implication.”³

Where an attorney appears without authority and confesses judgment, the remedy may be against him; or in a proper case, an application may be made to open the judgment. Where an at-

¹ Freeman on Judgments, secs. 563, 560; Lawrence v. Jarvis, 32 Ill. 304; Baltzett v. Nosler, 1 Iowa, 588; Price v. Ward, 1 Dutch. 225; Arnott v. Webb, 1 Dill. 362.

² Am. Lead. Cas. 5th ed. 643.

³ Freeman on Judgments, sec. 563, citing Finneran v. Leonard, 7 Allen, 54; McDermott v. Clay, 107 Mass. 501; Hoffman v. Hoffman, 46 N. Y. 30; Pollard v. Baldwin, 22 Iowa, 328; Carleton v. Bickford, 13 Gray, 591; Marx v. Fore, 1 Mo. 69; Easley v. McClinton, 33 Tex. 288; Norwood v. Cobb, 15 Tex. 500; S. C. 24 Ibid. 551; Rape v. Heaton, 9 Miss. 328; Kerr v. Kerr, 41 N. Y. 272; Starbuck v. Murray, 5 Wend. 148; Noyes v. Butler, 6 Barb. 613; Kane v. Cook, 8 Cal. 449. See also Chapman v. Austin, 44 Tex. 133.

torney confesses judgment against several partners, under an authority derived from only one, it is the duty of the others to make immediate application to the court to open the judgment. If they omit this, after notice, and permit their lands to be levied on, condemned, and sold, they are concluded by their own acquiescence, if not otherwise precluded from raising the objection against the sheriff's vendee. Giving notice of the objection at the sheriff's sale amounts to nothing more than to show that the party complaining has notice himself of the defect of authority, but acquiesces in it by taking no measures to arrest the proceedings.¹ If the judgment be confessed through fraud and collusion, the party may be relieved against it in equity. But a confession of judgment by counsel representing the case, with the knowledge of the party, is sufficient, without any special authorization to that effect. In attacking a judgment obtained by confession, especially after a long lapse of time, merits must be shown by the applicant.²

§ 202. Interference with judgment by a court of equity.—To justify a court of equity in interfering with a judgment at law on the ground of want of authority to appear, the evidence should show clearly and unequivocally that such judgment was fraudulently and wrongfully obtained without negligence or fault on the part of the judgment-defendant. The burden of proof is with the complainant, and before he is entitled to relief he must fully establish what he alleges to be true.³ And this cannot be done for the first time on review.⁴ With this understanding there seems to be no doubt but that a direct action in equity lies against a judgment obtained by the unau-

¹ *Cyphert v. McClure*, 22 Pa. 195.

A warrant of attorney to confess a judgment cannot be expressly revoked. The nature of the debt need not be described in the warrant, if it be for a sum certain. (*Eldridge v. Fobwell*, 3 Blackf. 208; *Odes v. Woodward*, 2 Ld. Raym. 849.) An attorney confessing a judgment may be called on to file his warrant. (*Weesy v. Kitchen*, 80 Pa. St. 160.)

² *Tippack v. Bryant*, 63 Mo. 580; *Bradish v. Gee*, 1 Amb. 229; *Lyon v. Williams*, 42 Ga. 168; *Davant v. Carlton*, 53 Ga. 491.

³ *Johnson v. Lyon*, 14 Iowa, 431; *Thomas v. Steele*, 22 Wis. 207; *Jennings v. Conn*, 11 Iowa, 542; *Shroudenbeck v. Company*, 15 Wis. 632.

⁴ *Floyd Co. v. Tompkins*, 23 Ind. 348; *Denton v. Noyes*, 6 Johns. 296; *Ellsworth v. Campbell*, 31 Barb. 134; *Pierson v. Holman*, 5 Blackf. 482.

thorized appearance of an attorney. But it should be brought with all possible speed after the judgment is rendered.¹ It has been the practice, sometimes by motion and sometimes in chancery, to relieve parties against judgments so rendered.²

§ 203. Collateral attack.—The presumption in favor of the attorney to appear has been said to be not merely *prima facie*, but conclusive in all collateral proceedings, and in such proceedings the party whose appearance seems to have been made by an attorney will not be permitted to prove that he never authorized the attorney to represent him.³ But other decisions at least intimate that the authority of the attorney can always be disputed,⁴ unless the acts be subsequently ratified by the client,⁵ by paying the attorney compensation, or even, perhaps, by silence, if he has knowledge of the proceedings.⁶

§ 204. Consequences of unauthorized appearance—Foreign and domestic judgments.—Many decisions hold that in a suit or direct action on a judgment rendered against a party, upon an unauthorized appearance by an attorney, if that judgment be a *domestic* one, the party cannot plead in defense his ignorance of the suit, and the attorney's want of authority to appear for him.⁷ But as to *foreign* judgments the contrary seems to be now settled, both in the Federal and State courts,

¹ Bryant v. Williams, 21 Iowa, 329.

² Critchfield v. Porter, 3 Ohio, 518; Shelton v. Tiffin, 6 How. 163; Truett v. Wainright, 4 Gilm. 420; De Louis v. Meek, 2 Greene, 55; Powell v. Spaulding, 3 Greene, 443; Ridge v. Alter, 14 La. An. 866; Marvel v. Manouvrier, 14 La. An. 3; Hefferman v. Burt, 7 Iowa, 321; McKelvay v. Jones, 2 Har. (N. J.) 345; Price v. Ward, 1 Dutch. 225.

³ Freeman on Judgments, sec. 128; Field v. Gibbs, 1 Peters C. C. 155; Baker v. Stonebroker, 34 Mo. 175; Reed v. Pratt, 2 Hill, 64; Hofmire v. Hofmire, 3 Edw. Ch. 174; Am. Ins. Co. v. Oakley, 9 Paige, 496; Carpentier v. Oakland, 30 Cal. 439; Hamilton v. Wright, 37 N. Y. 502; Brown v. Nichols, 42 N. Y. 26.

⁴ Hess v. Cole, 3 Zab. 125; Shumway v. Stillman, 6 Wend. 453; Shelton v. Triften, 6 How. 163. A recital in a decree that a party was represented by an attorney does not preclude the party from showing the attorney's want of authority. (Chapman v. Austin, 44 Tex. 133.)

⁵ Ryan v. Doyle, 31 Iowa, 53.

⁶ Reynolds v. Howell, L. R. 8 Q. B. 398; S. C. 6 Moaks' Eng. R. 129; Robson v. Eaton, 1 Term Rep. 62.

⁷ St. Albans v. Bush, 4 Vt. 58; Campbell v. Bristol, 19 Wend. 101; Lessee of Pillsbury v. Dugan's Admr. 9 Ohio, 117; Hollert v. Montgomery's Admr. 5 Dana, 11; Field v. Gibbs, 3 Peters C. C. 155; 2 Am. L. Cas. 803.

and consequently a judgment-debtor, in an action against him on the judgment of another State, may successfully defend by showing that the attorney who entered an appearance for him had no authority to do so.¹

The judgments of other States may be declared on as records and evidences of debt; on a proper plea the jurisdiction of the courts rendering them may be put in issue, but not the merits of the judgments. A record merely reciting one's having appeared by attorney was held not to be contradicted by a plea alleging that he never was without the jurisdiction of the court, was never served with process, and never did appear. The conclusiveness of judgments, therefore, as to matters tending to show that the court had jurisdiction, does not extend to such recitals, but only to specific averments of fact, such as an arrest, personal service, or personal appearance, and such general recitals, is *prima facie* only, may be traversed, and the contrary shown.²

In an action on a judgment of a court of another State, the defendant may defend by showing that such court had no jurisdiction of his person; and he may for that purpose show that he had no legal notice of the original suit, and never authorized any one to use his name or appear for him in that suit; unless, from the record of such judgment, it appears affirmatively, and as a matter of adjudication, that he had legal notice, or duly authorized an appearance. And the mere recital in a judgment, that the party "came in," has been held not to show conclusively that he had legal notice, or that he appeared in person and submitted to the jurisdiction, or that he authorized any one to

¹ Harshey v. Blackmarr, 20 Iowa, 161; Hindman v. Mackall, 3 Greene, 170; Latertett v. Cook, 1 Iowa, 1; Baltzell v. Nosler, Ibid. 588; Shelton v. Liffin, 6 How. 164; D'Arcey v. Ketchum, 11 Ibid. 165; Harris v. Hardeman, 14 Ibid. 334; Sherard v. Nevins, 2 Ind. 241; Thompson v. Emmert, 15 Ill. 415; Miller v. Gaskins, 2 Rob. (La.) 94; Gleason v. Dodd, 4 Met. 333; Aldrich v. Kenney, 4 Conn. 380; Starbuck v. Murray, 5 Wend. 148; Wilson v. The Bank, 6 Leigh, 570; Norwood v. Cobb, 24 Lex. 551; Price v. Ward, 1 Dutch. 225; Hess v. Cole, 3 Zab. 116.

² Gleason v. Dodd, 4 Met. 333, Per Shaw C. J.; Hall v. Williams, 6 Pick. 232; Bissell v. Briggs, 9 Mass. 462. See Noble v. Gold, 1 Mass. 410; Starbuck v. Murray, 5 Wend. 148; Holbrook v. Murray, 5 Ibid. 161; Shumway v. Stillman, 6 Ibid. 447; Wilson v. Bank, 6 Leigh, 570; Hoffman v. Stone, 31 Tex. 595; Bartlett v. Knight, 1 Mass. 401; Mills v. Duryee, 7 Cranch, 481; Hampton v. McConnell, 3 Wheat. 234; McElmoyle v. Cohen, 13 Peters, 312; Ferguson v. Mahon, 11 Ad. & E. 179; Robson v. Eaton, 1 T. R. 62; Aldrich v. Kinsey, 4 Conn. 380; Thompson v. Whitman, 18 Wall. 457; Knowles v. Company, 19 Wall. 58.

appear for him. And so, in an action in a State, on a judgment of a court in another State, rendered for costs, against a plaintiff in a suit commenced in the latter, he may defend successfully, by showing that he gave no authority to institute such suit, and had no knowledge thereof before judgment was rendered therein.¹

In an interesting case in Ohio it appears an action was brought in Ohio to recover on a judgment rendered in Arkansas. Personal appearance was entered in the first suit in Arkansas prior to the civil war. After the latter State had joined the Southern Confederacy, and while it was in arms against the Union, the defendants being residents of Ohio, the case was tried. The attorney for defendants, who was retained and appeared before the war, continued to do so on the trial of the case, and consented to a trial. It was claimed on one side that these facts gave the Court jurisdiction over the person; but, on the other, that such appearance could confer no power on the court to do an unauthorized act, and that the war and secession of the State worked a revocation of his agency. The court very fully considered the legal and political effect of the secession of Arkansas, and the validity in one State of a judgment rendered in another, which is valid, and shows jurisdiction upon its face, and how far such a judgment is entitled to faith and credit in the other State under constitutional provisions. The court came to the conclusion that an inquiry may be made into the jurisdiction of the court of the sister State, in which a judgment offered in evidence was rendered, that such a judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist, and that the power of the court to render the judgment is an open question.² Without going into the general subject, which would call for too extended a discussion, the case is so far relevant to

¹ *Watson v. Bank*, 4 Met. 343; *Gleason v. Dodd*, Ibid. 333.

² *Pennywit v. Foote*, 27 Ohio St. 600. The reader interested in the general subject will find a copious citation of authorities at page 618 of the report. See, also, as to the effect of the judgments of other States, *Freeman on Judgments*, 2d ed. chap. 26, and secs. 604, 604a. That the jurisdiction of the courts of a sister State may be inquired into collaterally, notwithstanding the recitals in the judgment, see especially, *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Company*, 19 Wall. 58; note to *Bartlett v. Knight*, 2 Proffatt's American Decisions, 42, where the authorities upon the general subject are reviewed.

the present matter, that it decides that, under the circumstances, the State being in armed rebellion, it was the duty of defendants' attorney to have declined to appear as such, or, if he appeared, to have taken the proper steps to suspend the proceedings. His consent to the hearing was not in the interest of his clients, and clothed the court with no jurisdiction, and that therefore the court had none.¹

And it may be generally stated in all cases of foreign judgments at least, that, though an attorney, who appears and confesses judgment for a suitor, is *prima facie* to be taken as having been retained, yet if the fact be otherwise the Court will, upon proof, set aside the judgment or declare it a nullity.² Counsel are not presumed to have appeared for the mere purpose of waiving their client's rights.³

It may be considered, therefore, as settled, that whenever it appears by the record of a judgment of a sister State, that the defendant appeared by attorney, it is *prima facie* evidence of the fact, but the defendant may rebut the presumption by proof that the attorney named in the record never had any authority to appear for him; in other words, notwithstanding the recital in the record, he may disprove the authority of the attorney to appear.⁴ It seems, that the question of authority of attorneys to appear in an action is, under proper instructions, a question of fact for the jury.⁵

It may well be asked why these rules should not also apply to domestic judgments as well as foreign. It may be said that, in the case of a foreign judgment, it is impossible, or at least unreasonable, to require the defendant to go to the court of the State which rendered it, and attack it directly by a bill or motion; hence, he is permitted to plead the want of authority in the attorney, defensively and collaterally: whereas, in the case

¹ Pennywit v. Foote, 27 Ohio St. 600, Ashburn, J. dissenting. See, also, to the same effect, Botts & Darnall v. Crenshaw, Chase, 224; Eaton v. Pennywit, 25 Ark. 141. See Foote v. Richmond, 42 Cal. 439; Wyatt v. Burr, 25 Ark. 476; Cyphert v. McClune, 22 Pa. 195.

² Dobbins v. Dupree, 39 Ga. 394. See Scott v. Eaton, 26 Ark. 17.

³ Borkheim v. Company, 38 Cal. 623.

⁴ Howard v. Smith, 33 N. Y. Superior Court R. 124; Shumway v. Stillman, 6 Wend. 447; Starbuck v. Murray, 5 Ibid. 148; Long v. Levy, 1 Hill, 597. But see Brown v. Nichols, 42 N. Y. 27.

⁵ Howard v. Smith, *supra*; Alspaugh v. Jones, 64 N. C. 29.

of a domestic judgment, it may be deemed better to force the party to assail it directly, (thus giving the court an equitable control over the proceedings,) by prohibiting him from resorting to the plea of want of authority in the attorney, collaterally, as a defense to a *scire facias*, or direct action on the judgment. Still, the party is entitled to relief when an unjust judgment, though a domestic one, has been rendered against him by fraud or collusion, or by the appearance of an unauthorized attorney, if the party seeks the relief by bill or motion promptly.¹

In Indiana, and other States, the rule is as follows: Where a judgment is rendered by a court of general jurisdiction, and the record shows that an attorney of the court appeared for the defendant and filed an answer, the jurisdiction of the court cannot be controverted unless it be by proof of fraud, or that the defendant was not a citizen of the State, nor during the pendency of the proceedings within the jurisdiction of the court, and had neither been notified of the suit, nor had given authority to an attorney to enter an appearance for him. Under such circumstances, upon establishing the fact that the appearance was unauthorized, he will be relieved from the judgment. But when a party is within the process of the court, although not served with notice, and an appearance had been entered for him by an attorney, the court will require him to aver in his proceedings to obtain relief from the judgment rendered, that he had a defense to the action, and if no rights of *bona fide* purchasers have intervened, the court will stay proceedings under the judgment while it preserves its lien and permits the party to make his defense to the original action, and to the extent he may succeed in that defense, relieve him from the effect of the judgment. And it is considered that this rule gives "full faith and credit to the judicial proceedings of every State"; the same faith and credit that we give to the records of our own State courts; and although the terms "domestic judgments" and "the judgments

¹ *Harshey v. Blackmarr*, 20 Iowa, 161; Per *Dillon*, *Lyon v. Boilvin*, 7 Ill. 629, J.; *Denton v. Noyes*, 6 Johns. 296; *Legere v. Richard*, 10 La. An. 669. It is said in Illinois, that if in a suit on a promissory note an attorney appears and has possession of the note sued on, the inference is that he has authority to conduct the suit; that he had none to prosecute the suit at law, affords no ground of equitable relief; but such a question must be determined in the court of law, not one of equity. (*Harris v. Galbraith*, 43 Ill. 309.)

of other States " are used in various decisions, and a distinction attempted to be drawn between them as two distinct classes, this rule is considered within the principle upon which all the authorities rest.¹ But where the defendant has not been within the jurisdiction of the court, it would not be just, it has been said, to compel him to come under that jurisdiction, and establish his defense to the action, in order to obtain relief from a judgment obtained without notice; and, therefore, the relief granted him must be absolute immunity from the judgment.²

§ 205. Effect of unauthorized appearance on innocent third parties.—Decisions in Iowa declare that a judgment procured by the appearance of an unauthorized attorney will be vacated in equity, though such vacation destroys the rights acquired by a *bona fide* purchaser without notice. But the Supreme Court of California has said relative to other cases: "If an unauthorized appearance by an attorney for a non-resident defendant, who was not served with process, can afterward be shown to invalidate the title of a *bona fide* purchaser without notice at the executive sale, it stands, so far as I am aware, as a solitary exception to the general rule, and the doctrine ought not to be further extended."³ But in the Supreme Court of the United States the rule is in favor of the doctrine of the Iowa courts; for where a party was not amenable to the jurisdiction of a court, and did no act to authorize the judgment, they said he could not be affected by it, or by any proceedings under it. "The judgment being void, for want of jurisdiction in the Court, no right passed (to the purchaser) under the marshal's sale."⁴

Of course, when an appearance has been entered, the claim to deny the authority of the attorney is viewed with disfavor,

¹ Wiley v. Pratt, 23 Ind. 628; Sherrard v. Nevins, 2 Ind. 241; Pierson v. Holman, 5 Blackf. 482; Shelton v. Tiffin, 6 How. 163; Floyd v. Tompkins, 23 Ind. 348; Boylan v. Whitney, 3 Ind. 140; Ellsworth v. Campbell, 31 Barb. 134; Hall v. Williams, 6 Pick. 232; Bodurtha v. Goodrich, 3 Gray, 511.

² Ibid. and Critchfield v. Porter, 3 Ohio, 518; Pierson v. Holman, 5 Blackf. 482; Sterne v. Bentley, 3 How. Pr. 331; Blodgett v. Conklin, 9 Ibid. 442; Ellsworth v. Campbell, 31 Barb. 134; Bunton v. Lyford, 37 N. H. 512.

³ Reeve v. Kennedy, 43 Cal. 649; Stokes v. Geddes, 46 Cal. 17; Harshey v. Blackmarr, 20 Iowa, 161; Bryan v. Williams, 21 Iowa, 329. See also Hamlin v. McCahill, Clarke Ch. 249.

⁴ Shelton v. Tiffin, 6 How. 163. See Freeman on Judgments, sec. 509.

whenever innocent third parties have acquired, or think they have acquired, rights under the judgment or decree.

§ 206. Effect of the attorney's pecuniary responsibility.—It is laid down in an early case in *Salkeld*,¹ that “when an attorney takes upon himself to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party this action against him.” But this doctrine stated thus broadly has been gradually undermined, and may now, we think, be considered as overthrown. It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by a judgment of a court without a day in court. It relieves the other party of a duty which belongs to him, viz: to serve his process and to see, at his peril, that his adversary is in court; and it compels the wrong party to look to the attorney. The rule was very soon qualified in the King’s Bench.² An attorney appeared, and judgment was entered against the supposed client, and the former had no warrant of attorney, and the question was if the court could set aside the judgment. The court said: “If the attorney be able and responsible, we will not set aside the judgment. The reason is, because the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but if the attorney be not responsible or suspicious, we will set aside the judgment; for otherwise the defendant has no remedy, and any one may be undone by that means.”³ But still this case turns upon the question whether the attorney was or was not responsible, and not upon the existence of his authority. But Lord Mansfield, in another and later case, placed his decision upon the true ground. This was a case where a warrant of attorney was forged, and the basis of the decision was that the “attorney who prosecuted the former suit in the plaintiff’s name had no authority given him by the plaintiff for so doing.”⁴ In the United States, Kent, then Chief

¹ 1 Salk. 86. The following concise report of an ancient case foreshadows the same doctrine: “*Might*, an attorney, was sued at law upon an action of the case, for confessing an action without warrant for one Hargate, for whom he had been an attorney, wherefore *Might* sought relief in this court, (chancery) and could not have it, in 1595.” (Toth. 15; Cary, 88, 89; 6 Mod. 16.)

² Anon. 1 Salk. 88.

³ See also S. C. 6 Mod. 16; *Stanhope v. Firmin*, 3 Bing. N. C. 303; *Mudry v. Newman*, 1 Crompt. M. & R. 402; *Hammond v. Thorpe*, 1 Ibid. 64.

⁴ *Robson v. Eaton*, (K. B. 1785) 1 T. R. 62.

Justice of New York, in 1810, referring to the last case in *Salkeld*, added:¹ "I am willing to go still further, and in every such case (of unauthorized appearance) to let the defendant into a defense," etc. This decision establishes that where an attorney appeared for a defendant, against whom a writ had been issued but not served, and without authority from the defendant confesses a judgment which is entered up in vacation, the judgment is regular. An appearance by an attorney of the court without warrant is good as to the court, and the defendant has an action against the attorney; but it is otherwise if there be any fraud or collusion between the plaintiff's attorney and the attorney for the defendant, or if the attorney for the defendant be not responsible, or perfectly competent to answer to his assumed client; the court will then relieve against the judgment. And where there is no fraud, the court, in order to protect the plaintiff from suffering by the act of the attorney, and at the same time to save the defendant from injury, will let the judgment stand, but stay all proceedings, and let in the defendant to plead if he has any defense. Kent, Chief Justice, further observed: "If there had been any collusion between the plaintiff and the attorney (who assumed to act) for the defendant, it would have altered the case; but there is none shown or pretended, and my whole opinion proceeds upon the ground that the plaintiffs have acted in good faith. I am disposed, therefore, to prevent all possible injury to the defendant, and at the same time save the plaintiffs from harm. This can be done only by preserving the lien which the plaintiffs have acquired by their judgment, and by giving the defendant an opportunity to plead, if he has any plea to make, to the merits." Later cases in New York have shown a tendency to afford still greater latitude for the purposes of defense.²

In the English Exchequer, also, the non-responsibility, or "suspiciousness," of the attorney has been declared to be "but a vague sort of criterion of safety to the defendant."³ The

¹ *Denton v. Noyes*, 6 Johns. 296.

² See *Ellsworth v. Campbell*, 31 Barb. 134; *Meacham v. Dudley*, 6 Wend. 514; *Williams v. Van Valkenburg*, 16 How. Pr. 144; *Am. Ins. Co. v. Oakley*, 9 Paige, 496; *Campbell v. Bristol*, 19 Wend. 101.

³ *Bayley v. Buckland*, 1 Ex.; 1 W. H. & G. 1. See, also, *Doe v. Eyton*, 3 Barn. & Ald. 785; *Hubbard v. Phillips*, 13 Mees. & W. 702; 14 Law J. N. S. Exchequer,

whole question was examined by Dillon, J., in an able opinion in a case in the Supreme Court of Iowa, in 1866.¹ The facts disclosed were, that the plaintiff was a non-resident of the State, and not personally amenable to its jurisdiction; that he had no notice, legal or otherwise, of a certain foreclosure proceeding; that no service, personal or constructive, was made upon him; that the plaintiff in the foreclosure suit, or his attorneys, procured an answer to be filed by fraudulent representations, and by an attorney who had from the non-resident no right, shadow or color of authority to do so; that the non-resident had rights which were injuriously affected by that decree; no laches appeared on his part; there was, however, no statement that the attorney was insolvent or unable to respond in damages. Upon this state of facts, the defendant was held entitled to relief against the decree; and the decree and a sale thereunder were declared nullities.² Where, however, there is any doubt that there is a want of authority, the judgment will not be disturbed. A clear case must be made out.³ An unauthorized appearance by an attorney may be ratified, even where there is no personal service, by the payment to the attorney on the part of the client of a consideration or compensation for his services; and the ratification may confirm the jurisdiction and validate the judgment.⁴ It will date back to the time when the acts were done.⁵ If the remedy against an attorney is in any way inadequate for the purposes of justice, as where the party is imprisoned by reason of the unauthorized act, the courts will immediately interfere;⁶ and will also if the proceedings are taken in the name of a party not in existence.⁷ This non-responsibility of the attorney is not the best criterion for the safety of the defendant; and it is held in England that the liability of a defendant for the acts of an attorney appearing for him without authority, whether solvent

103; *Williams v. Smith*, 1 Dowd. P. C. 632; 5 *Ibid.* 305; *Murdy v. Newman*, 1 *Crompt. M. & R.* 402; *Odell v. Odell*, 1 *Irish Ex.* 81; *Morgan v. Thorne*, 7 *Mees. & W.* 400.

¹ *Harshey v. Blackmarr*, 20 *Iowa*, 161.

² See *Shelton v. Tiffin*, 6 *How.* 163.

³ *Russell v. County*, 29 *Iowa*, 256.

⁴ *Ryan v. Doyle*, 31 *Iowa*, 53.

⁵ *Williams v. Butler*, 35 *Ill.* 544.

⁶ *Hambridge v. De la Croue*, 3 *C. B.* 742; 4 *Dowl. & L.* 400; *Anon.* 1 *Chitty*, 193a; *Contra*, *Alleley v. Colley*, *Cro. Jac.* 694.

⁷ *Hoskins v. Phillips*, 16 *Law J. N. S. Q. B.* 339.

or not, should be confined to cases in which the course of the proceedings has given him notice of the action being brought against him, and he has not interfered.¹

Judgments have been often vacated in cases of unauthorized appearances upon showing, by affidavits, the want of authority in those persons, and that the defendant did not know of their action in his name when it occurred. The courts have acted in these cases without inquiring whether the attorneys were solvent or insolvent.² Mr. Freeman, in his able "Treatise on Judgments,"³ after stating this fact, which is undoubtedly true, adds: "But in this respect they probably disregarded the current of the authorities." We think not. It is undoubtedly true that courts have made the solvency or insolvency of the attorney the turning point in granting or withholding relief; but we think this class of authorities is now out of date, and repudiated by the current of modern authority, as already indicated. And, indeed, in another portion of Mr. Freeman's work on "Judgments," the statement is made, that it seems to be a rule applicable to the greater part, if not to the entire United States, that a judgment resting upon the unauthorized appearance of an attorney may be annulled in equity, irrespective of the question whether the attorney is responsible or irresponsible, the judgment lien being preserved to secure the plaintiff from loss, should he afterward recover at a trial on the merits.⁴ This last view we entirely agree with, and go to the extent of saying that the pecuniary responsibility of the attorney, either on a motion to vacate or in a suit in equity, is a false quantity in the problem. Except in so far as it may appear affirmatively that the attorney is pecuniarily irresponsible, the *reason* for granting relief would be still stronger; but we do not think it necessary, however desirable, that this should so appear: that is to say, when the attorney is shown to be insolvent, *a fortiori*, the court will open the proceedings upon payment of costs.⁵

¹ Bayley v. Buckland, 1 Ex. 1; 16 Law J. N. S. 204; Norton v. Cowper, 3 Smale & G. 375.

² Yates v. Horanson, 7 Robt. 12; McKelney v. Jones, 2 Har. (N. J.) 345.

³ Freeman on Judgments, sec. 98.

⁴ Freeman on Judgments, sec. 499; Ridge v. Alter, 14 La. An. 866; Marvel v. Manouvrier, 14 Ibid. 3; Wiley v. Pratt, 23 Ind. 928; Gifford v. Thorn, 1 Stockt. Ch. 702, 722; Allen v. Stone, 10 Barb. 547; Ellsworth v. Campbell, 31 Ibid. 134; De Louis v. Meek, 2 Greene, 55; Jones v. Williamson, 5 Coldw. 371; Newcomb v. Dewey, 27 Iowa, 381.

⁵ Meacham v. Dudley, 6 Wend. 514.

§ 207. Laches.—"A defendant, against whom judgment is taken in favor of an innocent plaintiff upon an unauthorized appearance, is bound by such judgment, if it is in any way attributable to his laches. A party who has been guilty of no laches may repudiate the acts of a pretended, unauthorized attorney.¹ The cases have been said to fall into two classes:

First, where the defendant was served with process. In this case, the defendant, who, after being summoned, permits an unauthorized attorney to enter an appearance in his name, or who, in other words, does not inquire as to who has appeared in the suit, is guilty of negligence which postpones him to an innocent plaintiff, who, relying on such appearance by a responsible attorney, enters judgment, and takes title under such judgment. On the other side, if the appearance was entered by an irresponsible attorney, the facts may be such as to require that the plaintiff should inquire whether such attorney, so irresponsible, could have been employed by the defendant.

Secondly, where the attorney was not served with process. A plaintiff who, without giving the defendant legal notice by summons, accepts a waiver of summons and an agreement for an amicable action from an attorney, is bound to satisfy himself of the attorney's authority, and if he omits so to satisfy himself, the loss must be on himself.²

A party became the purchaser of a tract of land under an execution sale, subject to a mortgage. Fourteen months and a half after the purchase, a bill was filed to foreclose the mortgage. The purchaser was made one of the parties defendant to the bill, but was not served with process. The appearance, however, of the defendants, was entered generally. A decree of foreclosure was pronounced and the property sold, the mortgagee becoming the purchaser. The purchaser under the execution took no steps to redeem, or set aside the decree, not even procuring a sheriff's deed on his certificate of purchase, though the evidence showed he was aware of the foreclosure; but some six years afterward sold his certificate of purchase to the complainant, who obtained a sheriff's deed, and filed his bill for re-

¹ Wharton on Agency, sec. 567; *Am. Ins. Co. v. Oakley*, 9 Paige, 496; *Legere v. Richard*, 10 La. An. 669.

² *Bayley v. Buckland*, 1 Ex. 1; Wharton on Agency, secs. 567, 569.

demption. The land, in the meantime, was constantly occupied under the foreclosure title, and several times changed hands, and at the time of the purchase of the certificate by the complainant was occupied by the defendant. It was held for the purpose of allowing a redemption, under such circumstances, evidence could not be received impeaching the authority of the attorneys in entering the appearance of the purchaser under the execution in the foreclosure suit; that it was the duty of such purchaser, if he wished to redeem, to have come forward within a reasonable time, and asked the decree of foreclosure to be opened as to him; and that the complainant's equities were no stronger than those of the execution purchaser would be if he were complainant, being chargeable with notice of all the facts with which such purchaser would be chargeable. It will be perceived that the laches of the party, and the rights of the innocent third persons, all played an important part in this decision.¹

§ 208. Appearance for a portion of several parties, or for all.—When counsel appears expressly for certain defendants, his signature to papers in the case after that time, as attorney for the defendants, must be construed as restricted to those defendants for whom he expressly appeared in the first place. And when there are several defendants, and each appears by his own attorney, the proceedings on behalf of defendants must be conducted by their respective attorneys, until the authority is revoked, or other attorneys substituted. And the attorney for one defendant cannot give notice of motion, or accept service of notice, or stipulate for another defendant for whom he does not appear of record, and this is so although he signs as “attorney for defendants” generally.² But in actions where there are several defendants, an appearance by an attorney for the defendants generally must be construed *prima facie*, at least, as an appearance for all.³

Whenever an appearance by attorney is entered on the rec-

¹ Kenyon v. Shreck, 52 Ill. 382.

² Spangel v. Dellinger, 42 Cal. 148; Hobbs v. Duff, 43 Cal. 485; Buckland v. Conway, 16 Mass. 366.

³ Kenyon v. Shreck, 52 Ill. 382; Am. Ins. v. Oakley, 9 Paige, 498. See Jones v. Hunter, 4 How. (Miss.) 342; which probably goes too far in holding a party estopped from denying authority.

ord, it is always presumed that it is done by the authority of the party. A plea filed by attorney will be considered as an appearance for all the defendants, unless there is something in its language to restrict its application.¹

§ 209. Appearance for a partnership.—The entry by an attorney of his general appearance for the defendants, in an action against a partnership, must be construed to be an appearance of the partners as partners, and for the purpose of defending the action against the partnership, and not as an appearance for the partners individually, severally, and personally, so as to render a judgment against the partnership in such action binding on an individual partner in another jurisdiction, by whom such appearance was not authorized.²

In an action against the members of a commercial partnership, where only one member was served with process, and the attorney employed by him appeared for the defendants generally, and judgment was rendered against all of the defendants, it was held that such a judgment in Mississippi was regular, and could only be inquired into by the defendants who were not served with process making affidavit of that fact, and that they never employed the attorney, and on showing also that they had a good and legal defense to the action, of which they might have availed themselves if notice had been given.³

§ 210. Appearance by attorney in appellate courts.—When attorneys of record in the court below are retained as counsel for defendant in error in the appellate court, no formal notice of appearance is required. The adverse counsel should recognize and treat the attorneys who appeared of record in the lower court as counsel in the higher court, unless otherwise informed by actual notice.⁴ When notice of appeal is signed by an attorney of the court, the presumption is that he had authority to take such action.⁵

¹ *Schirling v. Scites*, 41 Miss. 644; *Rust v. Frothingham*, Breese, 260; *Jackson v. Stewart*, 6 Johns. 34; *Jones v. Hunter*, 4 How. 342; *Henderson v. Haines*, 5 How. 525; *Smith v. Boroditch*, 7 Pick. 137.

² *Phelps v. Brewer*, 9 Cush. 390.

³ *Walworth v. Henderson*, 9 La. An. 339.

⁴ *Frost v. Lawler*, 34 Mich. 235.

⁵ *Ricketson v. Compton*, 23 Cal. 636.

§ 211. Defendant's remedy against attorney bringing suit without authority.—In the case of an attorney's commencing an action without authority, he is liable, on a summary application to the court, or by action, to either party who may happen to be aggrieved thereby. The defendant may have the proceedings set aside and make the attorney pay the costs,¹ and this even after judgment, and though the attorney act innocently on a forged authority.² If the defendant pays the amount of the judgment, and then discovers that he has thus been improperly sued, he may recover back from the attorney both the debt and costs, in an action for money had and received.³ If the defendant has been arrested, or otherwise injured by the proceedings, he may bring a special action for damages.⁴ If the defendant is successful in the suit brought by an unauthorized attorney, and obtains a verdict, and the plaintiff is still insolvent and unable to pay the defendant's costs, the court may make the attorney liable for such costs.⁵

An attorney who appears or acts for another, without his assent, is precluded from recovering his costs for so doing from the party himself,⁶ or by means of any lien which may attach on the papers in the cause, and on the proceeds of the action.⁷ The attorney is moreover liable to penalties of the laws against maintenance, and to actions for damages which may be sustained either by the party himself⁸ or the opposite party,⁹ and may also be punished by attachment for misconduct,¹⁰ and made liable for the costs of the proceedings so improperly taken by him.¹¹

¹ *Doe v. Roe*, 3 Dowl. O. S. 496.

² *Robson v. Eaton*, 1 T. R. 62.

³ *Dupeu v. Keeling*, 4 Car. & P. 102.

⁴ *Anderson v. Watson*, 3 Car. & P. 214.

⁵ *Hammond v. Thorpe*, 1 Crompt. M. & R. 65; 2 Dowl. O. S. 721.

⁶ *Spurrier v. Allen*, 4 Car. & K. 210; 5 Mod. 205.

⁷ *Abbott v. Rice*, 3 Bing. 132.

⁸ *Alleley v. Colley*, Cro. Jac. 694; *Anon.* 1 Salk. 88; *Westaway v. Frost*, 17 Law J. N. S. Q. B. 286; 6 Johns. 34; 6 Johns. 296; 4 Mon. 377; 2 Har. & G. 374; *Henck v. Todhunter*, 7 Har. & J. 275; 7 Johns. 539; *Peters C. C.* 155; 7 Pick. 138; 1 Tyler. 304.

⁹ *Souter v. Watts*, 2 Dowl. 263; *Dunpin v. Keeling*, 4 Car. & P. 103; *Anderson v. Watson*, 3 Car. & P. 214.

¹⁰ 2 Hawk. P. C. chap. 22; 6 Johns. 296.

¹¹ *Hubbard v. Phillips*, 14 Law J. N. S. Ex. 103; S. C. 13 Mees. & W. 702; 2 Dowl. & L. 707.

§ 212. Remedy of the party whose name is used.—The party whose name is used without his authority is not prejudiced by the proceedings, at all events, before judgment.¹ The usual course is to apply to set the proceedings aside, as taken without authority, and this will especially be done in cases of fraud and collusion.² This course is open to either party,³ and in all cases where a party applies promptly to set aside proceedings in his behalf, taken without authority, the court will interfere to protect him;⁴ but the authority of an attorney will not be questioned at the instance of a stranger to the record.⁵ Where an attorney brings an action without the authority of the plaintiff, the latter is entitled to have the proceedings stayed without payment of costs.⁶

§ 213. Withdrawal of appearance.—Attorneys cannot withdraw their appearance in a cause without the permission of the court, and if it is withdrawn, and the record on appeal is silent as to the ground of withdrawal, the court will presume it was done upon satisfactory evidence to the inferior court.⁷ But the court may allow a plea to be withdrawn on motion, when put in by an unauthorized counsel. A plea filed by a mere volunteer counsel, not recognized by the party or his regular counsel, nor acquiesced in by either, may be withdrawn on motion, and it is error to refuse such withdrawal.⁸ Where an attorney on the record applies for permission to have his appearance stricken out, the presumption is that he does it by the authority of his client, and the client is not thereby entitled to a continuance of his case.⁹

¹ *Robson v. Eaton*, 1 Term Rep. 63; *Davies v. Eyton*, 3 Barn. & Adol. 785; *Odell v. Odell, Jones, (Ir.)* Ex. 81; *Morgan v. Thorne*, 7 Mees. & W. 310.

² 6 Johns. 296. A ratification of the proceedings of an attorney in a suit, if made without full knowledge of all the material facts, will not bind the client. (3 Mason, 405.)

³ *Hubbard v. Phillips*, 14 Law J. N. S. Ex. 103; 13 Mees. & W. 702; 2 Dowl. & L. 707; *Hoskins v. Phillips*, 16 Law J. Q. B. 339; *Robson v. Eaton*, 1 Term Rep. 62; *Doe v. Phillis*, 2 Chit. 170; *Mudry v. Newman*, 1 Crompt. M. & R. 402; 12 Mod. 218; 3 Ham. Ohio, 518.

⁴ *Williams v. Smith*, 1 Dowl. Pr. 632.

⁵ *Bryan v. Taylor, Wright*, 245.

⁶ *Reynolds v. Howell*, 8 Law R. Q. B. 398.

⁷ *Symmes v. Major*, 21 Ind. 433.

⁸ *Bell v. Usury*, 4 Litt. 384.

⁹ *Henck v. Todhunter*, 7 Har. & J. 275.

§ 214. Practice.—The proper practice to question the right or authority of the person who institutes a suit, is to obtain a rule of court upon him to show cause by what authority suit is brought in the name of another for his benefit.¹ But this order will not be granted on a mere suggestion, nor in a doubtful case. A clear and sufficient showing must be affirmatively made.² Facts must be stated by affidavits. An allegation that one is informed and believes that the attorney has no authority to bring suit is not enough, without more. In applications to set aside defaults, on the ground of want of authority on the part of plaintiff's attorney to bring the suit, the original affidavits should show a defense on the merits, and clearly establish the lack of authority. Counter affidavits may also be used.³ Courts have sometimes pursued the course, when a proper showing was made, of staying proceedings and letting in the defendant to plead his defenses, if any he should have, while at the same time they allowed the judgment to stand as a lien.⁴ In cases which have not gone to judgment another mode, sanctioned by some authorities, is for the defendant to move the court, upon proper affidavits, to dismiss the suit, upon the ground that it was not authorized by those in whose names it was brought. If an attorney, on such a motion, and after reasonable notice of it, fails to show his authority, the court may dismiss the suit. But it is not admissible either, upon a mere suggestion at the bar by the adverse party or his attorney, to deny the right of a party to appear by the attorney of record, or to deny that the attorney so appearing has full authority to prosecute the suit. Want of authority to appear is not a proper subject to be pleaded in abatement.⁵

When reasons are shown by affidavit, why the interest of an adverse party are jeopardized by presenting suits without the leave or consent from the real owner of the demand, the authority ought to be shown. The attorney's authority cannot be capriciously demanded. Probable cause must be shown. But

¹ *Lyon v. Glidwell*, 8 Yerg. 1.

² *Handley v. Statelov*, 6 Litt. 186; *Legere v. Richard*, 10 La. An. 669; *Campbell v. Arcenau*, 6 La. An. 120; *State v. Houston*, 3 Harr. (Del.) 15; *Pierson v. Holman*, 5 Blackf. 482.

³ *Reed v. Curry*, 35 Ill. 536.

⁴ *Floyd v. Tompkins*, 23 Ind. 348; *Denton v. Noyes*, 6 Johns. 296; *Ellsworth v. Campbell*, 31 Barb. 134.

⁵ *Turner v. Caruthers*, 17 Cal. 431; *McKiernan v. Patrick*, 4 How. (Miss.) 336.

when a case demands the disclosure, and a warrant of attorney is called for, it must be directly from the client, or an authorized agent. Letters written by the client to third persons, in which no particular suit is specified, which express gratification that a certain person had been employed in some controversy between the plaintiff and present defendant, are not sufficient to constitute a warrant of attorney, when one is demanded.¹

When a party repudiates the authority of an attorney at law to have acted for him, it should be supported by his own oath, and not that of an agent. The affidavits should state in what cause and on what occasions the attorney acted without authority.² When the defendant makes affidavit that he never employed the attorney, and no process has ever been served on him, if he can show that he had a good and legal defense to the action, of which he might have availed himself if he had been served, he has a right in equity, at least, to interpose that defense.³ No writ of error lies from an order of court refusing to permit an attorney to appear in a cause for want of authority.⁴ The defendant, if he intends to question the authority of an attorney in bringing a suit, should do so at the earliest practicable moment. There are cases which hold that when the pleadings for defendant have been filed and the issues made up, and especially when the case is called for trial, it is too late for the defendant to demand of the plaintiff's attorney his authority for appearing.⁵

¹ *McAlexander v. Wright*, 3 Mon. 190; *Day v. Squires*, 63 N. C. 254: If an attorney who is required to produce his authority to bring a suit, files the affidavit of the plaintiff's agent, that he was directed by the plaintiff to cause suit to be brought, and that he employed said attorney in pursuance of said direction, this constitutes a sufficient showing of authority. (*Hughes v. Osborn*, 42 Ind. 450.)

² *Handley v. Statelor*, 6 Litt. 186; *Legere v. Richard*, 10 La. An. 669; *Campbell v. Arcenau*, 3 La. An. 558; *Boykin v. Holden*, 6 La. An. 120.

³ *Walworth v. Henderson*, 9 La. An. 339.

⁴ *Ex parte Gillespie*, 3 Yerg. 325.

⁵ *Rowland v. Gardner*, 69 N. C. 53; *Rice v. Rice*, 66 N. C. 377. In California, an attorney having a license from another State, but not admitted to the courts of the former State, although accustomed to practice there and recognized by the bar as an attorney, has been held to be an officer of the court; and the entry of an appearance by such an attorney was held to be of the same effect as though the attorney had been admitted to practice in the courts of California. The court placed the ruling on the ground that he was an attorney of the court "*de facto*." (*Garrison v. McGowan*, 48 Cal. 592.) Under this theory it is somewhat difficult to ascertain the precise use or function of a license to practice law in that State. An attorney at law "*de facto*" would seem to be clothed with as much authority as an attorney on the rolls.

CHAPTER X.

AUTHORITY AND POWERS OF ATTORNEYS BY VIRTUE OF THEIR
RETAINER.

- § 215. Results flowing from the retainer.
- § 216. Law of principal and agent applicable.
- § 217. Authority and powers.
- § 218. Things that an attorney may do by virtue of his general retainer.
- § 219. Things an attorney may not do by virtue of his retainer without special authority.
- § 220. Control over conduct of suits and proceedings.
- § 221. When attorney may exercise his discretion.
- § 222. Binding effect of attorney's acts as against the adverse party.
- § 223. Authority to make admissions binding upon the client.
 - § 224. Implied admissions.
 - § 225. Attorney's admissions to prove his own authority.
 - § 226. Admissions of clerks, etc.
 - § 227. Recalling admissions before judgment.
- § 228. Authority to compromise litigated claims, and to make settlements.
 - § 229. Negligent compromise.
 - § 230. Notice of want of authority to compromise.
 - § 231. No compromise after judgment.
- § 232. Authority to demand and receive payment.
- § 233. Authority to refer or submit to arbitration.
- § 234. Collateral matters.
- § 235. Authority to stipulate that cause of action shall not abate.
- § 236. Authority to stipulate for continuance.
- § 237. Authority to receive notices.
- § 238. Effect of judgment on authority.
- § 239. Control over judgment and execution.
- § 240. Authority to satisfy judgment.
- § 241. Vacating judgment.
- § 242. Authority after judgment.
- § 243. Auxiliary proceedings.
- § 244. Authority of law partners.
- § 245. Authority of law clerks.
- § 246. Authority to employ substitutes.
- § 247. Ratification by the client.
- § 248. Duration of authority.
- § 249. Termination of the relation and of the authority.
 - § 250. By revocation of authority, and change and substitution of the attorney. General rules.
 - § 251. In England.
 - § 252. In United States.
 - § 253. Change after judgment.
 - § 254. Effect of the substitution on the attorney changed.
 - § 255. By withdrawal of attorney.
 - § 256. By death of attorney or client.

§ 215. **Results flowing from the retainer.**—Having considered in the preceding chapter, the retainer of the attorney and his general authority to appear, it now seems proper to investigate the results of the retainer, the authority and power with which the attorney is invested by reason of that retainer, and what acts the attorney may rightfully and authoritatively undertake to perform, without any further delegation of power from his client. In doing this an inquiry will be made as to his general authority, and as to how far the law of agency is applicable in the premises, as to the attorney's control over the judgment or execution; his authority to make admissions binding upon his client; his right to compromise suits and make settlements; his power to demand and receive payment for his client; the extent of his authority in collateral matters; when he may employ substitutes; what the result of the client's ratification of his acts may be; and the duration and termination of his authority by revocation, substitution, withdrawal, or death of the attorney.

§ 216. **The law of principal and agent** is generally applicable to the relation of attorney and client. The client is bound, according to the ordinary rules of agency, by the acts of his attorney, within the scope of the latter's authority.¹ "This includes the right to demand and receive payment in money of the client's debt; and part payments are within his power to receive, as well as payments in full.² As long as he appears as attorney on record, *bona fide* payments to him discharge the debt, no matter what private instructions he may have received from his client."³

But as in other cases of agency, the attorney, to bind the client,

¹ Wharton on Agency, sec. 580; Russell v. Lane, 1 Barb. 519; Lawson v. Bet-tison, 12 Ark. 401; Sampson v. Obleyer, 22 Cal. 200; Greenlee v. McDowell, 4 Ired. 481; Fairbanks v. Stanley, 18 Me. 296; Rice v. Wilkins, 21 Me. 538; Bethel v. Carmack, 2 Md. Ch. 143; Chambers v. Hodges, 23 Tex. 104; Nave v. Baird, 12 Ind. 318; Painter v. Abel, 8 L. T. N. S. 287.

² Wharton on Agency, sec. 580; Miller v. Scott, 21 Ark. 396; Heard v. Lodge, 20 Pick. 53; Bryans v. Taylor, Wright, 245; Langdon v. Potter, 13 Mass. 320; McCarver v. Nealy, 1 Greene, 360; Brackett v. Norton, 4 Conn. 517; Gray v. Wass, 1 Greenl. 257; Branch v. Burnley, 1 Call. 127; Ducett v. Cunningham, 39 Me. 386; Commissioner v. Rose, 1 Desaus. 469; Pickett v. Bates, 3 La. An. 627.

³ Ibid. State v. Hawkins, 28 Mo. 366.

must sometimes be expressly authorized. The general principle "will not sustain the payment of the principal of a mortgage to a solicitor employed to procure its assignment, the client retaining possession of the instrument."¹ Nor payment to a deceased person's attorney of a debt due the estate of the deceased;² nor a collusive receipt based on private arrangements between the attorney and the opposite side;³ nor payment to an attorney in the cause who is not the attorney on record;⁴ nor the sale or assignment of a claim to a stranger without express authority;⁵ nor the transfer of a promissory note put into his hands for collection."⁶

§ 217. General authority and powers.—The effect of a retainer to prosecute or defend a suit is to confer on the attorney all the powers exercised by the forms and usages of the court in which the suit is pending.⁷ He may receive payment;⁸ may bring a second suit after being nonsuited in the first for want of formal proof;⁹ may sue a writ of error on the judgment;¹⁰ may discontinue the suit;¹¹ may restore an action after a *not pros.*,¹² may claim an appeal and bind his client by a recog-

¹ Wharton on Agency, sec. 581; *Williams v. Walker*, 2 Sandf. 535.

² *Clark v. Richards*, 3 E. D. Smith, 89.

³ *Child v. Dwight*, 1 Dev. & B. Eq. 171; *Chambers v. Miller*, 7 Watts, 63; *Craig v. Ely*, 5 Stewt. & P. 354.

⁴ *Wurt v. Lee*, 3 Yeates 7.

⁵ *Penniman v. Patchen*, 5 Vt. 346; *Campbell's Appeal*, 29 Pa. 401; *Rowland v. State*, 58 Pa. 196; *Fassit v. Middleton*, 47 Pa. 214; *Held v. Jervais*, Walk. Mich. 431; *Card v. Wallridge*, 18 Ohio, 411.

⁶ *Terhune v. Colton*, 10 N. J. Eq. 21; *White v. Hildreth*, 13 N. H. 104; *Child v. Eureka*, 44 N. H. 354; *Goodfellow v. Landis*, 36 Mo. 168.

⁷ A client who puts his case against another into the hands of an attorney for suit, is presumed to authorize and sanction such action as the latter, in his superior knowledge of the law, may decide to be legal, proper, and necessary in the prosecution of the demand, and whatever adverse proceedings the attorney may take are to be considered, so far as they affect the defendant in the suit, as approved in advance by the client and therefore his act; even though they prove to be unwarranted by the law. As to trespasses upon third parties, the rule is different. (*Foster v. Wiley*, 27 Mich. 244.)

⁸ 2 Greenl. Ev. sec. 141; *Langdon v. Potter*, 13 Mass. 320; *Brckett v. Norton*, 4 Conn. 517; *Gray v. Wass*, 1 Greenl. 257; *Erwin v. Blake*, 8 Peters, 18; *Commissioners v. Rose*, 1 Desaus, 469; *Hudson v. Johnson*, 1 Wash. 10; *Ducett v. Cunningham*, 39 Me. 386.

⁹ *Scott v. Elmendorf*, 12 Johns. 315.

¹⁰ *Grosvenor v. Danforth*, 16 Mass. 74.

¹¹ *Gaillard v. Smart*, 6 Cowen, 385.

¹² *Reinhold v. Alberti*, 1 Binn. 469.

nizance in his name for the prosecution of it;¹ may submit the suit to arbitration;² but, it is said, only under rule of court.³ In the absence of fraud the client is concluded by the acts and even by the omissions of his attorney.⁴ A general authority to commence suits will warrant an attorney in commencing a suit and attaching property, and will render the client responsible for any damages occasioned thereby;⁵ but a plaintiff's attorney cannot, under his general authority, purchase land sold under an execution issued in the cause for the benefit of and as trustee for his client.⁶ A ratification of the proceedings of an attorney in a suit is invalid, if made without full knowledge of all the material facts.⁷

Besides having the conduct of the mere formal proceedings, the law implies an authority arising from the retainer to act for the client in all points of doubt or discretion; the principal being compelled, at common law, to fulfill everything that is done by his attorney, whether by judgment or final concord.⁸

An attorney may, on his general retainer in a cause, suffer judgment for his client;⁹ but this is a power that must be exercised with extreme caution.¹⁰ He is also authorized to receive payment, or satisfaction,¹¹ or waive irregularities.¹²

In the absence of proof to the contrary, such acts as accept-

¹ *Adams v. Robinson*, 1 Pick. 462.

² *Somers v. Balabrega*, 1 Dall. 164; *Holker v. Parker*, 7 Cranch, 436; *Buckland v. Conway*, 16 Mass. 396; *Abbe v. Rood*, 6 McLean. 196.

³ *Markley v. Amos*, 8 Rich. 468.

⁴ *Lewis v. Sumner*, 54 Mass. 13 Met. 269; *Smith v. Bossard*, 2 McCord, 406; *Lawson v. Bettison*, 12 Ark. 401; *Bethel Church v. Carmack*, 2 Md. Ch. 143; *Greenlee v. McDowell*, 4 Ired. Eq. 481; *Chambers v. Hodges*, 23 Tex. 104; *Sampson v. Ohleyer*, 22 Cal. 200; *Russell v. Lane*, 1 Barb. 519; *Wieland v. White*, 109 Mass. 392; *Moulton v. Bowker*, 115 Mass. 36; *Jenney v. Delesdernier*, 20 Me. 183; *Rogers v. Greenwood*, 14 Minn. 333.

⁵ *Fairbanks v. Stanley*, 18 Me. 296.

⁶ *Beardsley v. Root*, 11 Johns. 464.

⁷ *Williams v. Reed*, 3 Mason. 405.

⁸ Co. Litt. 52; *Gray v. Gray*, 2 Roll. R. 63; 2 Yates, 546.

⁹ *Payne v. Chute*, 1 Roll. 365; *Anon.* 12 Mod. 440; 6 Johns. 296; 4 Mon. 377; 5 N. H. 393.

¹⁰ *Ibid.*

¹¹ *Yates v. Freckleton*, Doug. 623; *Powel v. Little*, 1 W. Black. 8; *Griffiths v. Williams*, 1 T. R. 710.

¹² *Latuch v. Pacherante*, 1 Salk. 86. The attorney, though authorized, is not bound to receive money on an execution, if he prefers his client should receive it. (4 McCord, 259.)

ing service of process will be presumed to be authorized.¹ Whether one who has assumed to act as attorney for another was authorized to do so is, under proper instructions from the court, a question of fact for the jury to determine.² The rule that the authority of an attorney at law cannot be disputed, only applies when he acts within the scope of his authority and the limits of duties which his profession imposes on him. When disputed, the authority of an attorney at law not of record requires proof as in other cases of agency.³

§ 218. What the attorney may do by virtue of his general retainer.—He may also sue out an alias execution;⁴ may receive livery of seizin of land taken by extent;⁵ may waive objections to evidence, and enter into stipulations for the admission of facts, or conduct of the trial;⁶ and for release of bail;⁷ may waive notices, give extensions of time to file papers, and confess judgment;⁸ and may open a default which he has taken, (whether properly or improperly) and vacate the judgment entirely, even though (it has been held) his client has instructed him to the contrary. And this, on the theory that a client has no right to interfere with the attorney in the due and orderly conduct of the suit, and certainly cannot claim to retain a judgment obtained, and an execution issued fraudulently.⁹

When a sworn attorney enters his appearance for a party, the party is bound by any admissions made by him in writing, though out of court, concerning the facts in the cause, until the appearance is withdrawn, or the party revokes the attorney's authority, and gives notice of the revocation; and until the appearance is withdrawn, or the authority revoked and the revocation noti-

¹ *Conrey v. Brenham*, 1 La. An. 397.

² *Alspaugh v. Jones*, 64 N. C. 29.

³ *Succession of Barr*, 8 La. An. 458; *Ex parte Gillespie*, 3 Yerg. 325.

A married woman may charge her separate estate by directing her attorney to allow judgment to be taken against her, though she was not liable in the action. (*Palen v. Starr*, 7 Hun. 422.)

⁴ *Cheever v. Merrick*, 2 N. H. 376.

⁵ *Pratt v. Putnam*, 13 Mass. 363.

⁶ *Alton v. Gilmananton*, 2 N. H. 520.

⁷ *Hughes v. Hollingsworth*, 1 Murph. 146.

⁸ *Pike v. Emerson*, 5 N. H. 393; *Talbot v. McGee*, 4 Monr. 377; *Bank v. Geary*, 5 Pet. 99.

⁹ *Read v. French*, 28 N. Y. 293.

fied, the party cannot give evidence on the trial of the cause, that the attorney had no authority in fact.¹ Stipulations made in open court by the attorney in respect to a pending cause are, when free from fraud and authorized, binding on the client, and cannot be repudiated by the successors in employment of the attorney who made the agreement.²

Among other acts which the attorney is authorized to perform by reason of his general retainer, and without any special authority for each particular act, are the following:

To receive payment of the debt, and to receipt therefor; and such payment amounts to payment to the plaintiff, and the latter is bound by the receipt.³ Where the debt has been paid to the plaintiff's clerk, after writ issued and before service, and the attorney is aware of the payment, he has no right to proceed further with the action, although he will be entitled to the costs of his writ;⁴ to demand and receive costs;⁵ and to order the sheriff to withdraw from possession under a *fi. fa.*⁶ But an attorney of record has not, by virtue of his retainer, any implied authority to discharge out of custody a defendant in execution, before he has received payment of the sum recovered in the action. He must have special authority from the plaintiff for such purpose.⁷

An attorney of record has power to verify papers by affidavit,⁸ to waive such verification,⁹ to accept service,¹⁰ to discontinue the

¹ *Lewis v. Sumner*, 13 Met. 269; *Kent v. Ricards*, 3 Md. Ch. 392; *Fowler v. Morrill*, 8 Tex. 153. But see *Hess v. Cole*, 3 Zab. 116.

² *Lockwood v. Black Hawk Co.*, 34 Iowa, 235.

³ *Yates v. Freckleton*, 2 Doug. 623; *Varley v. Garrard*, 2 D. C. P. 490.

⁴ *Wyllie v. Phillips*, 4 Scott, 474; 5 D. P. C. 644; 3 Bing. N. C. 776.

⁵ *Mason v. Whitehouse*, 4 Bing. N. C. 692; 6 Scott, 575.

⁶ *Levi v. Abbott*, 4 Ex. 583; 19 Law J. Ex. 26. But see *Foster v. Rowland*, 7 Jur. N. S. 998; *Baber v. Harris*, 2 W. W. & H. 53.

⁷ *Savary v. Chapman*, 3 Perry & D. 604; 8 D. P. C. 656; 4 Jur. 411; 11 Ad. & E. 829; *Connop v. Challis*, 2 Ex. 484; 6 Dowl. & L. 48; 17 Law J. Ex. 319. See 15 and 16 Vict. chap. 76, sec. 124. An acceptance of service by the attorney of record of a citation of appeal, will be presumed to be authorized by his client, in the absence of contrary proof. (*Ingraham v. Richardson*, 2 La. An. 841.)

⁸ *Wright v. Parks*, 10 Iowa, 342; *Bates v. Pike*, 9 Wis. 224; *Wharton on Agency*, sec. 585.

⁹ *Smith v. Mulliken*, 2 Minn. 319.

¹⁰ *Hofferman v. Burt*, 7 Iowa, 320. When service of a notice of motion for a new trial is accepted by one attorney for another who was his associate on the trial, each, however, appearing for different defendants, it will be presumed that he had authority to accept the service, if the point is raised for the first time in an appellate court. (*McCreary v. Everding*, 44 Cal. 284.)

suit,¹ to appeal from a decision,² to accept a statement of evidence instead of a formal deposition,³ to direct and control an attachment on mesne process,⁴ to release before judgment an attachment of real estate,⁵ to restore an action after a *non pros.*, though without his client's consent,⁶ to limit the effect of a judgment,⁷ to admit facts on the trial of a cause, and to admit facts by writings out of court.⁸ A counsel in a cause has power to enter into a stipulation in a suit in which he is employed, there being no unfairness, and the court will not on motion set it aside.⁹

Such admissions are evidence against his client, though his mere statements in the course of conversation are not. If a fact is admitted by the attorney on the record, with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission; but it is clear that whatever the attorney says in the course of conversation is not evidence in the cause, and admissions made previous to the commencement of the proceedings are inadmissible, without express proof of authority from his principal.¹⁰ An attorney of record also has power to agree, during the pendency of an action, that after judgment, execution shall be postponed.¹¹ He has power to waive objections to interrogatories.¹² The attorney intrusted with a note for collection by suit is authorized to sue out the process of attachment, and his client is liable for the actual damage if the process is wrongfully

¹ Gaillard v. Smart, 6 Cowp. 385.

² Adams v. Robinson, 1 Pick. 462.

³ Lacoste v. Roberts, 11 La. An. 33.

⁴ Jenny v. Delesdernier, 20 Me. 183.

⁵ Moulton v. Bowker, 115 Mass. 36.

⁶ Reinhold v. Alberti, 1 Binn. 469.

⁷ Union Bank v. Geary, 5 Peters, 98.

⁸ Talbot v. McGee, 7 Mon. 377; Pike v. Emerson, 5 N. H. 293; Gilkeson v. Snyder, 8 Watts & S. 200; Farmers' Bank v. Sprigg, 11 Md. 389; Smith v. Dixon, 3 Met. (Ky.) 438; Wenans v. Lindsay, 1 How. (Miss.) 557; Starke v. Kenan, 11 Ala. 819; Lewis v. Sumner, 13 Met. 269.

⁹ Farmers' Bank v. Ketchum, 4 McLean, 120.

¹⁰ Wagstaff v. Wilson, 4 Barn. & Adol. 339; Young v. Wright, 1 Camp. 140; Parkins v. Hawkshaw, 2 Stark. 240; Milward v. Temple, Ibid. 375; Gainsford v. Grammar, 2 Camp. 9; Elton v. Larkins, 1 Moody & R. 196; S. C. 5 Car. & P. 385; Marshall v. Cliffs, 4 Camp. 133.

¹¹ Wieland v. White, 109 Mass. 392; Union Bank v. Georgetown, 5 Peters, 99.

¹² Roberts v. Harris, 32 Ga. 542.

sued out, although he may have instructed his attorney to use proper means only.¹

An attorney, by virtue of his retainer and general control over a cause, has the power to bind his client by consenting to an order of court; and when such consent is properly given by the attorney, it cannot, after the order has been made, be revoked by the client.² An attorney may give the opposite side time to file pleadings and papers, and a judgment by default taken by one law partner who was ignorant of the fact that his copartner had given time to defendant's counsel to file an answer, will be reversed or vacated.³ Attorneys may order briefs printed, and the client will be liable for the expense; but not for a greater number than the rules require, or than is necessary.⁴

An attorney has authority to refer a cause without any fresh authority,⁵ and may, after judgment rendered, give a stipulation allowing an extension of the time to perfect an appeal,⁶ and make arrangements concerning the progress of a cause, as the putting off of a trial, and the like, without any special authority from the client,⁷ and discontinue an action;⁸ but not to stipulate that no appeal shall be taken.⁹

The power of an attorney to sue upon a bill of exchange implies a power to collect or receive the proceeds, and instructions restricting his power to taking judgment are not admissible in evidence unless they are shown to have been brought to the knowledge of the payor before payment made.¹⁰ The attorney may enter into agreements which will be held conclusive evidence of the facts agreed to,¹¹ and may waive statutory requisites.¹² He is authorized, but not bound, to receive money for his client

¹ *Kirkley v. Jones*, 7 Ala. 622.

² *Hart v. Spalding*, 1 Cal. 213.

³ *Brooks v. Cavanaugh*, 11 La. An. 183.

⁴ *Weisse v. New Orleans*, 10 La. An. 46.

⁵ *Faviell v. Eastern*, etc. 2 Ex. 344; 2 Dowl. & L. 51. See, also, *Fake v. Smith*, 7 Abb. Pr. 108; 2 Abb. Ct. of App. Dec. 76; *Tiffany v. Lord*, 40 How. Pr. 481.

⁶ *Hoffenberth v. Muller*, 12 Abb. Pr. N. S. 222.

⁷ *Shaw v. Kidder*, 2 How. Pr. 244.

⁸ *Barrett v. Third Avenue*, 45 N. Y. 628; *Gaillard v. Smart*, 6 Cro. 383.

⁹ *People v. Mayor*, 11 Abb. Pr. 66; *Bates v. Voorhies*, 20 N. Y. 525.

¹⁰ *Planters' Bank v. Massey*, 2 Heisk. 360.

¹¹ *Burbank v. Company*, 24 N. H. 552; *Goodrich v. Railroad*, 38 Ibid. 390; *Page v. Brewsters*, 54 Ibid. 184.

¹² *Hanson v. Hoitt*, 14 Ibid. 56.

on execution;¹ and if one of a firm waives it, and the firm dissolves, and the recipient fails to pay it over, the others are liable.² An attorney for a client residing in another State is authorized to use all reasonable and usual means to secure his client's claim. He may indemnify an officer for making a levy directed by him in good faith and upon reasonable grounds; and if he indemnifies the officer by his own bond, he may recover from his client what he is obliged to pay thereon.³ If orders be given by the creditor to an attorney "to obtain immediate security for a demand," the whole manner of doing it is left to the discretion of the attorney, and the creditor is bound by his acts.⁴

§ 219. What the attorney may not do by virtue of his retainer and without special authority.—But the attorney has no authority to execute any discharge of a debtor but upon the actual payment of the full amount of the debt,⁵ and that in money only.⁶ But it has been held that he may take payment of a part in money and the residue in a short undoubted note.⁷

The attorney has no power to release sureties,⁸ nor to enter a

¹ *Poole v. Gist*, 4 McCord, 149.

² *Ibid.*

³ *Clark v. Randall*, 9 Wis. 135.

⁴ *Rice v. Wilkins*, 21 Me. 558.

⁵ *Savory v. Chapman*, 8 Dowl. 656; *Jackson v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 10 Johns. 220; 5 *Peters*, 113; *Gullett v. Lewis*, 3 Stewt. 23; *Carter v. Talcott*, 10 Vt. 471; *Kirk v. Glover*, 5 Stewt. & P. 34; *Tankersly v. Anderson*, 4 Desaus. 45; *Simonton v. Barrell*, 21 Wend. 362; *Lewis v. Gamage*, 1 Pick. 347; *Wilson v. Wadleigh*, 36 Me. 496; 32 Me. 110; *Derwort v. Loomer*, 21 Conn. 245; *Kent v. Ricards*, 3 Md. Ch. 392; *Stackhouse v. O'Hara*, 14 Pa. 88; *Walker v. Scott*, 13 Ark. 644.

⁶ *Commissioners v. Rose*, 1 Desaus. 469; *Treasurer v. McDowell*, 1 Hill (S. C.) 184; *Nolan v. Jackson*, 16 Ill. 272; *McCarver v. Nealy*, 1 Greene, 360; *Wright v. Daily*, 26 Tex. 730; *Gullett v. Lewis*, 3 Stewt. 23; *Cost v. Genetle*, 1 Port. 212; *Craig v. Ely*, 5 Stewt. & P. 34; *Givens v. Briscoe*, 3 J. J. Marsh. 534; *Perkins v. Grant*, 2 La. An. 328; *Phelps v. Preston*, 9 Id. 488; *Campbell v. Bailey*, 19 *Ibid.* 172; *Kent v. Ricards*, 3 Md. Ch. 392; *Keller v. Scott*, 10 Miss. (2 Smed. & M.) 81; *Garvin v. Lowry*, 15 Miss. (7 Smed. & M.) 24; *Wilkinson v. Holloway*, 7 Leigh, 277.

An attorney at law, in virtue of his general powers as such, has no authority to receive depreciated bank paper in payment of a debt placed in his hands for collection; and if he collects in such funds, his client is not bound to accept it. (*West v. Ball*, 12 Ala. 340; *Chapman v. Cowles*, 41 Ala. 103; *Davis v. Lee*, 20 La. An. 248; *Trumbull v. Nicholson*, 27 Ill. 149.)

⁷ *Livingston v. Rateliff*, 6 Barb. 201.

⁸ *Givens v. Briscoe*, 3 J. J. Marsh. 532; *Varnum v. Bellamy*, 4 McLean, 87.

retraxit,¹ nor to act for the legal representatives of his deceased client,² nor to release a witness,³ nor a party in interest.⁴

It appears to be not within the ordinary business of a solicitor to receive purchase-money belonging to his client, or money due to him on mortgage; nor to receive money from him for the purpose of investment generally, and one partner is not liable for the misapplication of money so received by another without his privity.⁵

One of two attorneys in partnership has no implied authority to bind his partner by a note or bill in the name of the firm, though given for their debt, as for money handed to the firm by a client to be laid out on mortgage; nor to sign an undertaking in the name of the firm, for the payment of the amount of debt and costs of plaintiff in an action, in order to procure the discharge of the defendant in that action from custody;⁶ nor is one partner liable in general for the transactions of the other with third parties without his knowledge, and outside of the partnership business.⁷ But an attorney is civilly responsible for the fraudulent representation of his partner, as to the investment of moneys intrusted to the firm.⁸

The attorney has power to waive technical advantages,⁹ and to confess judgment.¹⁰ But a general retainer will not authorize the attorney to release the interest of witnesses,¹¹ to enter a

¹ *Lambert v. Sandford*, 3 Blackf. 137.

² *Wood v. Hopkins*, 2 Pen. (N. J.) 689; *Campbell v. Kincaid*, 3 Mon. 566.

³ *Marshall v. Nagel*, 1 Bailey, 308; *Browne v. Hyde*, 6 Barb. 392.

⁴ *Succession of Weigel*, 18 La. An. 49.

⁵ *Bourdillon v. Roche*, 27 L. J. Ch. 681. See *Viney v. Chaplin*, 2 DeGex. & J. 468; 4 Jur. N. S. 619; 27 L. J. Ch. 434.

⁶ *Henley v. Bainbridge*, 3 Q. B. 316; 2 Gale & D. 483; 11 Law J. Q. B. 293; *Hasleham v. Young*, 8 Jur. 338; Dav. & M. 700; 5 Q. B. 833; 13 Law J. Q. B. 205. But see *Harman v. Johnson*, (*infra*).

⁷ *Simms v. Brutton*, 5 Ex. 802; 20 Law J. Ex. 41; *Harman v. Johnson*, 17 Jur. 1099; 2 El. & B. 61; 3 Car. & K. 272; 22 Law J. Q. B. 297.

⁸ *Blair v. Bromley*, 16 Law J. Ch. 495.

⁹ *Hanson v. Hoitt*, 14 N. H. 56; *Alton v. Gilmanton*, 2 N. H. 520; *Pierce v. Perkins*, 2 Dev. 250; *Hart v. Spalding*, 1 Cal. 213.

¹⁰ *King v. Cartee*, 1 Pa. 147; *Gray v. Gray*, 2 Roll. 63; *Denton v. Noyes*, 6 Johns. 296; *Alton v. Gilmanton*, 2 N. H. 293; *Pike v. Emerson*, 5 N. H. 293; *Talbot v. McGee*, 4 Mon. 377. See *People v. Lamborn*, 2 Ill. 1 Scam. 123.

¹¹ *Wharton on Agency*, sec. 586; *Murray v. House*, 11 Johns. 464; *East River Bank v. Kennedy*, 9 Bosw. 573; *York Bank v. Appleton*, 17 Me. 55; *Bell v. Bank*, 8 Ala. 590; *Browne v. Hyde*, 6 Barb. 392; *Springer v. Whipple*, 17 Me. 351; *Marshall v. Nagle*, 1 Bail. 308; *Shores v. Caswell*, 13 Met. 413.

retraxit when it is a final bar,¹ to assign the suit to a third party,² to release a garnishee from attachment,³ to release indorsers on a note,⁴ to admit in such a way as to bind his client, erroneous positions of law,⁵ nor to stipulate not to appeal, nor to move for a new trial.⁶

A general power to defend a cause will not authorize the attorney to execute an appeal bond in the client's name.⁷ The attorney has generally, by virtue of his retainer, authority to do only those acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action.⁸ But an attorney has no power, *virtute officii*, to purchase for his client, at a judicial sale, land sold under a mortgage held by the client, and the burden of proving that he had authority rests upon him.⁹ Attorneys cannot waive substantial rights of the client without the latter's consent.¹⁰

A client is not bound by a contract entered into on his behalf by the attorney, without authority conferred, or subsequent ratification by the former.¹¹ A stipulation by the attorney not to appeal or seek a new trial will not bind his client.¹² And a waiver of trial by jury in criminal cases is not binding on the defendant, if made without consulting him, even though he was present in court.¹³ An attorney who receives a note for collection cannot, without special instructions, make any agreement which will bind his principal, by which an indorser can be released from his liability.¹⁴ A general authority to appear will

¹ *Lambert v. Sandford*, 2 Blackf. 137.

² *Weathers v. Roe*, 4 Dana, 474; *Head v. Gervais*, Walk. Ch. 431; *Mayer v. Blease*, 4 S. C. 10.

³ *Quarles v. Porter*, 12 Mo. 76.

⁴ *Varnum v. Bellamy*, 4 McLean, 87.

⁵ *Mitchell v. Cotten*, 3 Fla. 136.

⁶ *People v. Mayor*, 11 Abb. Pr. 66.

⁷ *Halbrook's Case*, 5 Cowen, 35; *Clark v. Courser*, 29 N. H. 170.

⁸ *Wieland v. White*, 109 Mass. 392; *Rice v. Wilkins*, 21 Me. 558; *Pierce v. Strickland*, 2 Story, 292; *Moulton v. Bowker*, 115 Mass. 36.

⁹ *Savery v. Sypher*, 6 Wall. 157.

¹⁰ *How v. Lawrence*, 2 N. J. 99.

¹¹ *Ireland v. Todd*, 36 Me. 149.

¹² *People v. Mayor*, 11 Abb. 66.

¹³ *Brown v. State*, 16 Ind. 496. See *Cancemi v. The People*, 18 N. Y. 123.

¹⁴ *Barnum v. Bellamy*, 4 McLean, 87.

not authorize the attorney to execute an appeal bond in the name of the client,¹ or to purchase land sold under an execution issued in the cause for the benefit of and as trustee for his client;² or to enter into an agreement by which land is to be taken instead of money;³ or to release the surety of his client's debtor;⁴ or to compromise the debt;⁵ though a compromise acquiesced in for years may bind the client;⁶ or to enter into private and executory contracts;⁷ or purchase on his own account, or as agent for third parties, without the consent and against the interest of his client, and leaving the client's debt unsatisfied.⁸ An attorney is not authorized to assign a demand to a third person so as to bind the client, and if he do assign it and the assignee receive the money, assumpsit for money had and received lies in favor of the client against the assignee;⁹ nor has an attorney power to sell his client's judgment, and his attempted sale of it will only bind the client when the act is ratified or adopted by receipt of the purchase-money, or otherwise.¹⁰

It was at one time doubted whether the attorney could not discharge the debt without satisfaction;¹¹ but the English and American decisions are now to the effect that his power does not extend that far.¹² Some cases hold, however, that an attorney may authorize a sheriff to depart from the regular and ordinary course of his duty in collecting the judgment, as in giving time to pay a portion of the judgment, or taking a note for a portion on payment of the balance.¹³

¹ *Ex parte Holbrook*, 5 Cowen, 35.

² *Beardsley v. Root*, 5 Cowen, 35.

³ *Huston v. Mitchell*, 14 Serg. & R. 307.

⁴ *Givens v. Briscoe*, 3 J. J. Marsh. 529.

⁵ *Holker v. Parker*, 7 Cranch, 436; *Vail v. Conant*, 15 Vt. 314; *Dunbar v. Morris*, 3 Rob. (La.) 278.

⁶ *Mayer v. Foulkrod*, 4 Wash. C. C. 511.

⁷ *Herbert v. Alexander*, 2 Call. 498.

⁸ *Hawley v. Cramer*, 4 Cowen, 717, 741.

⁹ *Penniman v. Patchin*, 5 Vt. 346; *Card v. Walbridge*, 18 Ohio, 411; *Russell v. Drummond*, 6 Ind. 216; *White v. Hildreth*, 13 N. H. 104; *Child v. Powder Works*, 44 N. H. 354; *Rowland v. Slate*, 58 Pa. 196; *Goodfellow v. Landis*, 36 Mo. 168; *Danley v. Crawl*, 28 Ark. 95; *Kelley v. Norris*, 10 Ark. 18.

¹⁰ *Campbell's Appeal*, 29 Pa. 401; *Mayer v. Blease*, 4 Rich. 10.

¹¹ *Crary v. Turner*, 6 Johns. 53.

¹² *Savory v. Chapman*, 11 Ad. & E. 829; 3 Perry & D. 604; 8 Dowl. O. S. 656; *Jackson v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 10 Johns. 220; *Simonton v. Barrell*, 21 Wend. 362. See, however, *Gorham v. Gale*, 7 Cowen, 739.

¹³ *Gorham v. Gale*, 7 Cowen, 739; *Walters v. Sykes*, 22 Wend. 566; *Corning v. Southland*, 3 Hill, 552.

The acts of an attorney, in directing the levy upon or taking of goods upon process, are in excess of his general powers, and in the absence of proof of special authority, do not subject the client to liability.¹ An attorney employed to collect a debt has no authority to release the sureties upon his client's claim.² He is not authorized to receive in payment anything but the full amount of money due,³ nor discharge a defendant from imprisonment,⁴ nor release a valid and proper lien in favor of his client and upon real estate,⁵ nor release sureties to an undertaking on appeal,⁶ nor release an indorser.⁷ Neither has the attorney power under his general authority to consent that money taken from his client on arrest shall be paid into the treasury as security for his client's appearance, or for any purpose,⁸ nor to bid for his client at an execution sale,⁹ nor to assign the claim or judgment of his client.¹⁰ An attorney not having special authority to assign the judgment obtained by him in the name of his client to one of several judgment debtors, or to a third party for the benefit of one of the judgment debtors, and having undertaken to do so, and receiving for such assignment the amount of the judgment, it was held that the assignment was a nullity; but the reception of the amount of the judgment by the attorney, even if he did not pay it over to his client, is a payment of the judgment, and an execution cannot afterward issue to enforce the collection of the judgment in favor of the client. His only remedy is against the attorney.¹¹

Welsh v. Cochran, 63 N. Y. 181; *Averill v. Williams*, 4 Denio, 295.

² *Savings Institution v. Chinn's Admr.*, 7 Bush, 539.

An English solicitor has no implied authority to pledge his client's credit to his counsel by an express promise to pay his fees, whether they relate to litigation or not, so as to enable the counsel to sue the client for them. (*Mostyn v. Mostyn*, 5 Law R. Ch. Appeals, 457; approving *Kenedy v. Brown*, 13 Com. B. N. S. 677.)

³ *Maddux v. Bevan*, 39 Md. 485; *Lewis v. Woodruff*, 15 How. Pr. 539; *People v. Mayor*, 11 Abb. Pr. 74.

⁴ *Jackson v. Bartlett*, 8 Johns. 361; *Kellogg v. Gilbert*, 10 Johns. 220; *Simonton v. Barrell*, 21 Wend. 362; 11 Abb. Pr. 75.

⁵ *Banks v. Robb*, 4 Brewst. 106.

⁶ *Quinn v. Lloyd*, 36 How. Pr. 378.

⁷ *East River Bank v. Kennedy*, 9 Bosw. 543.

⁸ *City v. Heiland*, 67 Ill. 278.

⁹ *Beardsley v. Root*, 11 Johns. 164; *Hawley v. Cramer*, 4 Cowen, 717; *Averill v. Williams*, 4 Denio, 295.

¹⁰ *Mayer v. Blease*, 4 S. C. N. S. 10.

¹¹ *Maxwell v. Owen*, 7 Cold. 630.

An attorney has not, by virtue of his general authority in the conduct of a cause, power to stipulate to give, without payment, a satisfaction of the judgment, or to release one defendant from liability so as to bind the plaintiff, without payment. But where an attorney, without special authority from plaintiffs, his clients, stipulates that a satisfaction of the judgment should be given to one of several defendants without payment, and that he should not be held liable in any way for said judgment, it was held that such an agreement would be void as against the plaintiffs, but would bind the attorney in person; and the attorney afterward having purchased the judgment, and issued execution on it, his levy was set aside on motion.¹ An attorney employed to sue for and collect a claim cannot bind his client, without his consent, by a release of any of the defendant's property from the lien of the judgment he obtains.² An attorney's authority to defend an action gives him no authority to stipulate that his client's property taken on execution shall be sold at private sale by a person other than the sheriff.³ An attorney has no authority by virtue of his general retainer to bind his principal by the stipulations of a deed of trust taken to secure the debt of the principal.

§ 220. Control over suits.—In the general management of a suit, the attorney has a very extensive authority, which springs mainly from his general retainer. He has the free and full control of a case, in its ordinary incidents, and as to those incidents is under no obligation to consult his client.⁴ In important matters, however, he should do so, and take his client's instructions. He is likewise under obligations to render an account when de-

¹ *Carstens v. Barnstorff*, 11 Abb. Pr. N. S. 442; *Lewis v. Woodruff*, 15 How. Pr. 539.

² *Phillips v. Dobbins*, 56 Ga. 617.

³ *Berthold v. Fox*, 21 Minn. 51; *Kronschable v. Knoblaugh*, *Ibid.* 56.

⁴ *Wharton on Agency*, sec. 585; *Nightengale v. Railroad*, 2 Sawyer, 339; *Commissioners v. Younger*, 29 Cal. 147; *Simpson v. Lombas*, 14 La. An. 103; *Ward v. Hollins*, 14 Md. 158; *Pierce v. Strickland*, 2 Story, 292; *Clark v. Randall*, 9 Wis. 135; *McConnell v. Brown*, 40 Ind. 384; *Edgerton v. Brackett*, 11 N. H. 218. Where a party to an action has an attorney of record, a stipulation signed by the party in person, granting time to file a statement, will be disregarded by the court. The attorney has the exclusive management and control of the case, nor will his temporary absence alter the rule. (*Mott v. Foster*, 45 Cal. 72.)

sired. As the client is bound by the attorney's acts, if there is no collusion with the opposing party, the client can have redress in case of injury from the attorney alone.¹ Agreements by the attorney, which are so unreasonable as to imply bad faith, are notice of such bad faith to the opposing side, and will not bind the client.²

One who appears only as counsel in a case is not authorized to sign a stipulation for a continuance, even if he be an attorney and counsellor of the court in which the suit is pending. The conduct of a suit, except in a matter arising in the argument or hearing before the court, is exclusively under the control of the attorney of record in it. Whatever interest other counsel may have in the event of the suit, or the subject-matter of it, they are virtually strangers to the record. In the Federal Courts, if a party does not choose to manage his cause personally, as permitted by section 35 of the Judiciary Act, (1 U. S. Stats. 92) he can only do so by an attorney of the Federal Courts. He cannot appoint an agent not an attorney of the Federal Courts, and authorize an agent to represent him in the suit. But when a party makes his choice, and selects an attorney to conduct and manage his case, the attorney stands in his place. Until such attorney is changed or discharged he has the exclusive control of the conduct and management of the suit. He cannot give a *release* or discharge the cause of action; but he has exclusive control of the remedy, and may continue or discontinue it.³

§ 221. When attorney may exercise his discretion.—
The attorney may exercise his discretion in all the ordinary oc-

¹ *Greenlee v. McDowell*, 4 Ired. Eq. 481; *Chambers v. Hodges*, 23 Tex. 104; *Bethel Church v. Carmack*, 2 McCh. 143; *Lawson v. Betterson*, 12 Ark. 401; *Sampson v. Obleyer*, 22 Cal. 200; *Foster v. Wiley*, 27 Mich. 244; *Collett v. Foster*, 2 Hurl. & N. 356; *Crook v. Wright*, R. & M. 278; *Becke v. Pennsylvania*, 7 C. & P. 397.

² *Ball v. Leonard*, 24 Ill. 146; *Howe v. Lawrence*, 22 N. J. L. 99; *Wharton on Agency*, sec. 585.

³ *Nightingale v. Company*, 2 Sawyer, 338; *Opinion of Deady, J.*, Jan. 1873, U. S. District Court for Oregon; *Gaillard v. Smart*, 6 Cowen, 383; *Kellogg v. Gilbert*, 10 Johns. 220. Where counsel for defendant in an action alleged to have been prosecuted maliciously agreed, without special authority from the client, that the dismissal of the action should be a bar to an action for malicious prosecution, the agreement was held a nullity. (*Marbourg v. Smith*, 11 Kan. 554.)

currences which take place in a cause, and may make stipulations, waive technical advantages, and generally assume the control of the action.¹ And to this extent the client has no right to control the attorney in the due and orderly conduct of a suit. So, if the case is of such a nature that there can be no doubt that, according to settled rules of practice, a default will be opened by the court on the usual terms, it is the attorney's privilege and perhaps his duty, when applied to for that purpose, to stipulate to open the default, and not compel the other side to apply to the Court for relief; and this, notwithstanding the client may have instructed the counsel not to waive the advantage if the other side offer sufficient excuse, entitling the party on motion to be let in on payment of costs.²

§ 222. Binding effect of attorney's acts as against adverse party.—As between the client and the opposite party the former is bound by every act which the attorney does in the regular course of practice, and without fraud or collusion, however injudicious the act may be.³ If the attorney mistakes the form of action, or puts in a bad or a false action,⁴ or, by negligence, suffers judgment to go for want of an answer, submits to a nonsuit, withdraws the record, or even confesses the action, the client may be bound. So the attorney may discontinue the action,⁵ waive a judgment for want of an answer,⁶ or refer a cause,⁷ and the client is bound. Where an attorney stipulated as a condition of obtaining a postponement of a trial that the suit should not abate by the death of his client before trial, the client being at that time dangerously ill, and not expected to recover, the attorney was held to have acted within the scope of his authority, and the court refused on motion to set aside a verdict obtained after the death of the party, and afterwards refused to stay proceedings in an action on the judgment against the defendant's executors until the determination of a writ of error.⁸

¹ *Gorham v. Gale*, 7 Cowen, 739; *King v. Pinsoneault*, 6 Law R. P. C. 245.

² *Anon.* 1 Wend. 108. See *Clussman v. Merkel*, 3 Bosw. 402. But the attorney has no power to vacate a judgment pending an appeal. (*Quinn v. Lloyd*, 5 Abb. Pr. N. S. 281.)

³ *Latuche v. Pasherante*, 1 Salk. 86; *Griffiths v. Williams*, 1 T. R. 710.

⁴ *Tabram v. Horn*, 1 M. & R. 228.

⁵ *Gaillard v. Smart*, 6 Cowen, 385.

⁶ *Anon.* 1 Salk. 86; *Reinholdt v. Alberti*, 1 Binn. 469.

⁷ *Filmer v. Delber*, 3 Taunt. 486.

⁸ *Ames v. Webbers*, 10 Wend. 575, 624; S. C. 11 Wend. 186.

§ 223. What admissions of attorneys are binding on their clients.—An attorney may often bind his client by admissions; but a statement made by the plaintiff's to the defendant's attorney, in conversation with respect to the nature of the claim in the action, but not expressly made for the purpose of being used as evidence, is not admissible.¹ Admissions of the attorney are only evidence against the client when they are made with a view to obviate the necessity of proving the facts admitted at the trial.² Admissions that things existed on a certain day are no evidence of the same state of facts at some subsequent date.³ Written admissions made for the purpose of a former trial may be used on a new trial.⁴ But letters written to the plaintiff's attorney before action by the attorney who afterward appears in the cause for the defendant, are not evidence of facts admitted therein, unless it be proved that the defendant authorized the communication.⁵

“As a matter of practice, an attorney, by admissions made during the trial of a case, or in correspondence relating to such trial, may conclude his client, in cases in which, on the faith of such admissions, reciprocal admissions are made on the other side. Such admissions, forming part of a mutual plan for the trial of the case, are irrevocable by the client, except in cases of fraud, or of gross mistake.”⁶ An attorney may admit facts on the trial, or in pleading.

“It is otherwise, however, with non-contractual admissions of the attorney, not accepted as part of the mutual arrangements

¹ *Petch v. Lyon*, 9 Q. B. 147; *Parkins v. Hawkshaw*, 2 Stark. 239; 15 Law J. Q. B. 393; *Wilson v. Turner*, 1 Taunt. 398.

² *Young v. Wright*, 1 Camp. 140.

³ *Macleod v. Wakley*, 3 Car. & P. 311.

⁴ *Elton v. Larkins*, 5 Car. & P. 285; 1 Moody & R. 196.

⁵ *Wagstaff v. Wilson*, 4 Barn. & Adol. 339; 1 Nev. & M. 1; *Pope v. Andrews*, 9 Car. & P. 564.

⁶ Wharton on Evidence, sec. 1184; Stephens' Ev., art. 17; *Langley v. Oxford*, 1 Mees. & W. 508; *Elton v. Larkins*, 1 Moody & R. 196; 5 Car. & P. 385; *Doe v. Bird*, 9 Car. & P. 6; *Marshall v. Cliffs*, 4 Camp. 133; *Pike v. Emerson*, 5 N. H. 393; *Burbank v. Insurance Co.*, 24 N. H. 550; *Smith v. Hollister*, 32 Vt. 695; *Lewis v. Sumner*, 13 Met. 269; *Herbert v. Alexander*, 2 Call, 499; *Daniel v. Ray*, 1 Hill, (S. C.) 32; *Smith v. Bossard*, 2 McCord, 406; *Wilson v. Spring*, 64 Ill. 18; *Lacoste v. Robert*, 11 La. An. 33; *Kohn v. Marsh*, 3 Rob. (La.) 48; *Smith v. Mulliken*, 2 Minn. 319; Wharton on Agency, sec. 585. But admissions made by an attorney long after a case has been tried and his employment ended, are not binding. (*Walden v. Bolton*, 55 Mo. 405.)

for the trial of the case.¹ Such admissions may be rebutted, but nevertheless they constitute *prima facie* evidence, or in other words, they relieve, at the first instance, the opposing party from the burden of proving that which they admit, supposing the authority of the attorney to be first proved.² Thus an attorney, by admitting the signature to a bond, relieves the opposing party from proving such signature;³ by calling upon the opposite side to produce a bill 'accepted by A,' (the client) admits A's acceptance;⁴ by appearing for parties as owners of a ship, admits their joint ownership;⁵ and so on a second trial, a written agreement, admitting certain facts, signed by the counsel when the first trial opened, has been regarded as dispensing *prima facie* with the proof of such facts."⁶

Admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause, and are generally conclusive.⁷ When counsel on both sides have entered into a written agreement as to certain facts, it is not competent on the trial for the party who introduces such statement to the jury to prove a fact contrary to what it is stated to be in the agreement. To avail himself of this right, proper notice should be given.⁸ It is said that upon a grave question involving the public interests, the mere admission of counsel will not relieve the court from its consideration.⁹ Admissions of matters of fact by an attorney, in order to bind the client, should be distinct, formal, and made for the express purpose of dispensing with formal proof of a fact at the trial. Those which occur in mere conversations, though they relate to the matters in issue in the case, cannot be received in evidence against the client.¹⁰

¹ *Young v. Wright*, 1 Camp. 141; *Floyd v. Hamilton*, 33 Ala. 235.

² *Moulton v. Bowker*, 115 Mass. 36; *Bathgate v. Haskin*, 59 N. Y. 533; *Thomas v. Kinsey*, 8 Ga. 421; *McLean v. Clark*, 47 Ga. 24; *Cassels v. Usry*, 51 Ga. 621; *McRea v. Bank*, 16 Ala. 755; *People v. Garcia*, 25 Cal. 531.

³ *Milward v. Temple*, 1 Camp. 275.

⁴ *Holt v. Squire*, Ryan & M. 282.

⁵ *Marshall v. Cliff*, 4 Camp. 133.

⁶ *Van Wart v. Wolley*, Ryan & M. 4; *Truby v. Seybert*, 12 Pa. 101; *Merchants' Bank v. Marine Bank*, 3 Gill, 98.

⁷ *Rogers v. Greenwood*, 14 Minn. 333.

⁸ *Southwestern R. R. Co. v. Atlantic, etc. Co.* 53 Ga. 401.

⁹ *Ash v. Parkinson*, 5 Nev. 15.

¹⁰ *Treadway v. Company*, 40 Iowa, 526; 1 Greenl. sec. 186.

“ Mere conversational admissions by an attorney, thrown off collaterally, cannot bind his client, the attorney being a special, not a general, agent ;¹ nor are such admissions receivable, when made tentatively, for purposes of compromise.² So oral and less formal admissions by counsel at a former trial are not evidence on a subsequent trial ;³ and, in any view, an attorney's power thus to admit ceases when he withdraws from the case.⁴ An attorney's admission, when duly authorized and properly made, is to be treated as if made by the party himself. Such admissions, therefore, may be subsequently used against such party by a stranger.⁵ The point is that a record between other parties may be admissible in evidence, whenever it contains a solemn admission or judicial declaration by any such parties in regard to the existence of any particular fact.”

Admissions made by attorneys of record in the course of a cause, or with respect to the proceedings in it, are evidence against the client, though his mere statements in the course of conversation are not ;⁶ nor are his statements, made previous to the commencement of the proceedings, without express proof of authority from the client.⁷ If a fact is admitted by the attorney of record with the intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission.

Attorneys are considered to have an implied authority to make any admission for the purpose of obviating the necessity of proving any fact upon a trial, as where an attorney gives a direct and formal admission of the execution of a deed, or of the dishonor of a bill. or where he makes propositions on behalf of his client.⁸ In an action against the defendant as acceptor of a

¹ Wharton on Evidence, sec. 1184; *Doe v. Richards*, 2 Car. & K. 216; *Patch v. Lyon*, 9 Q. B. 147; *Watson v. King*, 3 Com. B. 608.

² *Saunders v. McCarthy*, 8 Allen, 42.

³ *Colledge v. Horn*, 3 Bing. 119; *R— v. Coyle*, 7 Cox C. C. 74; *Wilkins v. Stidger*, 22 Cal. 231.

⁴ *Janeway v. Skerritt*, 30 N. J. L. 97.

⁵ Wharton on Ev. sec. 1185; *Truby v. Seybert*, 12 Pa. 101; *McDermott v. Hoffman*, 70 Pa. 32.

⁶ *Young v. Wright*, 1 Camp. 140; *Milward v. Temple*, Ibid. 375; *Gainsford v. Grammar*, 2 Camp. 9; *Elton v. Larkins*, 1 Moody & R. 196; S. C. 5 Car. & P. 385; *Marshall v. Cliffs*, 4 Camp. 133.

⁷ *Wagstaff v. Wilson*, 4 Barn. & Ad. 339.

⁸ *Gainsford v. Grammar*, 2 Camp. 7.

bill, where his attorney has served a notice on the plaintiff to produce all papers relating to a bill, described in the same terms as the one sued upon, and which the notice stated to have been "accepted by the defendant," this was held *prima facie* evidence of the defendant's acceptance.¹ So an undertaking by an attorney on the record to appear for two persons, described in the undertaking as joint owners of a ship.² Admissions may be made indirectly, as where an attorney's admission of the handwriting of the attesting witness to a deed was held tantamount to aid admissions of the due execution of the instrument.³ An admission, however, of the due execution of the instrument mentioned in the declaration, will not preclude the defendant from taking advantage of a variance.⁴ So in an action for use and occupation, where a witness stated that he had heard from the plaintiff's attorney that there was an agreement in writing, it was held that this was not sufficient evidence of the existence of an agreement, so as to render its production necessary.⁵ So admissions that are expressly made "without prejudice," are inadmissible in evidence.⁶

A counsel has power to enter into a stipulation in a suit wherein he is employed, and there being no unfairness or charge of impropriety, the court will not, on motion, set aside the agreement.⁷ Representations by counsel in the presence of his client, on the faith of which one has advanced money; are the representations of the client.⁸ An agreement in writing made by an attorney conducting a cause, and within the scope of his authority, is binding upon his client, although the counsel be changed.⁹ A waiver of informalities and irregularities made by an attorney having sole charge of the cause, is binding upon the client.¹⁰ Where several suits were brought by the same plaintiff against

¹ *Holt v. Squire*, Ryan & M. 282.

² *Marshall v. Cliff*, 4 Camp. 133.

³ *Milward v. Temple*, 1 Camp. 70.

⁴ *Goldie v. Shuttleworth*, 1 Camp. 70.

⁵ *Watson v. King*, 3 Com. B. 608; *Petch v. Lyon*, 9 Q. B. 147.

⁶ *Ibid.*

⁷ *Farmers' Bank v. Ketchum*, 4 McLean, 120.

⁸ *Gilkeson v. Snyder*, 8 Watts & S. 200.

⁹ *Calmes v. Stone*, 7 La. An. 133.

¹⁰ *Hanson v. Hoitt*, 14 N. H. 56.

different defendants, the defenses being the same in each case, and the attorneys of the several parties agreed that all the cases should abide the final decision in one case, it was held that the agreement was within the authority of the attorneys.¹

Although stipulations made by an attorney of record, pertinent to the matters intrusted to him, are binding upon the client, though made without special authority; yet acts done outside of the matter committed to his charge are not binding, as a stipulation not to appeal; and especially where the attorney is unable to respond in damages, the court will relieve the client, preserving the other party from loss. So of a stipulation not to move for a second trial. Such rights cannot be taken away without the client's express consent.²

An admission signed by the defendant's attorney, consenting to admit the defendant to be editor of a periodical work—calling it by name—is no evidence that the defendant was editor on a day subsequent to the date of such admission.³ In an action of debt on bond, an admission by an attorney of the handwriting of the attesting witness presumptively admits the delivery of the bond as the defendant's deed.⁴ An attorney, regularly retained by defendants in a suit to foreclose a mortgage, has power on the hearing of a cause to make admissions as to the sum due from his clients, which will bind them.⁵

Offers made by the plaintiff's attorney in the hearing of a third person, to do an act relative to the defendant which lay within the scope of his authority, are not admissible evidence to affect the plaintiff with such offer. But if the offers are made to the defendant it is otherwise.⁶ A letter written to the plaintiff's attorney before action by the attorney who afterwards appears in the cause for the defendant, is not evidence of a fact admitted therein, without further proof that the defendant authorized the communication.⁷ It is said that if the clerk of an attorney has the management of a cause, what he says is receivable

¹ *North Missouri Railroad Co. v. Stephens*, 36 Mo. 150.

² *People v. Mayor*, 11 Abb. Pr. 66.

³ *Macleod v. Wakley*, 3 Car. & P. 311.

⁴ *Milward v. Temple*, 1 Camp. 375.

⁵ *Wilson v. Spring*, 64 Ill. 14.

⁶ *Wilson v. Turner*, 1 Taunt. 398.

⁷ *Wagstaff v. Wilson*, 4 Barn. & Adol. 339; 1 N. & M. 1.

in evidence, the same as if it had been said by the attorney himself. Where an attorney's clerk admitted, on the taxation of costs before the master, that the suit in which the costs were taxed was conducted by his employer from motives of charity, on behalf of the plaintiff, it has been held that the clerk was such an agent as to bind his master by such admission.¹

To bind by admissions it is generally sufficient to prove that the party is attorney of record.² If the client be not present when the admission is made by his counsel, the current of authority seems to be that such admissions cannot be used outside of the particular cause.³ An admission, however, for the purpose of the trial of a cause may be used upon a new trial, even when there has been an alteration in the pleadings, if the alteration does not affect the fact admitted.⁴ In criminal cases admissions are not admissible unless made at the trial by defendant or his counsel.⁵

§ 224. Implied admissions.—In every trial there are facts with the proof of which counsel may tacitly agree to dispense. Such facts cannot ordinarily be disputed by the party by whom they have been tacitly admitted,⁶ at least after they have been acted upon by the other side.

§ 225. Attorney's admissions to prove his own authority.—The employment of an attorney like the employment of an agent cannot be proved solely by his own admission; his admis-

¹ *Standage v. Creighton*, 5 Car. & P. 405; *Ashbourne v. Price*, D. & R. N. P. C. 48.

² *Marshall v. Cliff*, 4 Camp. 133; *Gainsbord v. Grammar*, 2 Camp. 9. See, however, *Wagstaff v. Wilson*, 4 Barn. & Adol. 339; *Burghart v. Augerstein*, 6 Car. & P. 695; *Pope v. Andrews*, 9 Ibid. 564; *Roberts v. Gresley*, 3 Ibid. 380.

³ 1 Phillips on Evidence, C. H. & E. notes 141, 508.

⁴ *Elton v. Larkins*, 1 Moody & R. 196; *Wetherall v. Bird*, 7 Car. & P. 6; *Langley v. Oxford*, 1 Mees. & W. 508. But see *Colledge v. Horn*, 3 Bing. 119.

⁵ *Rex v. Thornhill*, 8 Car. & P. 575.

⁶ Wharton on Evidence, sec. 1186; *Chile v. Roe*, 1 El. & B. 279; *Stracy v. Blake*, 1 Mees. & W. 168. See generally, *Colledge v. Horn*, 3 Bing. 119; S. C. 10 Moore 431; Taylor's Evidence, sec. 709; *Haller v. Worman*, 2 Fost. & F. 165; *R. v. Coyle*, 7 Cox C. C. 74; *Swinfen v. Swinfen*, 25 Law J. Com. P. 303; 26 Ibid. 97; 1 Com. B. N. S. 364; 27 Law J. Ch. 35; S. C. 24 Beav. 549; affirmed, 2 DeGex & J. 38; 27 Law J. Ch. 491; *Chambers v. Mason*, 5 Com. B. N. S. 59; *Swinfen v. Chelmsford*, 5 Hurl. & N. 890; *Priestwick v. Poley*, 34 Law J. Com. P. 189; 18 Com. B. N. S. 806; *Strauss v. Francis*, Law R. 1 Q. B. 379; S. C. 7 B. & S. 365; Wharton on Agency, sec. 589.

sions cannot be received unless he is shown to be an attorney *aliunde*. The employment must be proved to include the particular suit as to which admission is made.¹ But the attorney may be a witness to prove his employment and authority.

§ 226. Admissions of clerks.—Admissions made by an attorney's clerk, in the performance of his ordinary office duties, are treated as tantamount to the admissions of the attorney himself.² But the clerk should be the managing clerk.

§ 227. Recalling admissions before judgment.—As a question of law, errors of counsel cannot prejudice the client, if such error is recalled before judgment. So far as concerns errors of fact, perhaps the statements of counsel, when made in the client's presence and as his representative, may be treated as if made by the client himself; but the client is entitled to recall the admission at any time before judgment entered, if it should appear that the error is not traceable to any wrongful intent of his own, and that the opposite party is not prejudiced thereby. But it is otherwise when, in consequence of the attorney's admissions, the position of the opposite party has been altered, so that it would be detrimental to the latter for the admission to be revoked.³

§ 228. Attorney's power to compromise.—In England, the decisions upon the subject of the power of counsel to compromise are not uniform. Pollock, C. B., said in *Swinfen v. Chelmsford*, (2 L. T. N. S. 406) "that although counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, * * and other matters which properly belong to the suit, and the management and conduct of the trial, he has not, by virtue of his retainer in the suit,

¹ Wharton on Evidence, sec. 1187; *Burghart v. Augerstein*, 6 Car. & P. 645; *Pope v. Andrews*, 9 Ibid. 564; *Wagstaff v. Wilson*, 4 Barn. & Adol. 339; Wharton on Agency, sec. 582; *Moffitt v. Witherspoon*, 10 Ired. 185.

² Wharton on Evidence, sec. 1188; *Griffith v. Williams*, 1 T. R. 710; *Truelove v. Burton*, 9 Moore, 64; *Taylor v. Williams*, 2 Barn. & Adol. 845; *Standage v. Creighton*, 5 Car. & P. 406; *Power v. Kent*, 1 Cowen, 211; *Birkbeck v. Stafford*, 14 Abb. 285; S. C. 23 How. Pr. 236; *Meyer v. Sefton*, 2 Stark. 274.

³ *Mitchell v. Cotton*, 3 Fla. 136; Wharton on Evidence, sec. 1189.

any power over matters which are collateral to it.”¹ Yet, in another English case, Cresswell, J., said: “If counsel, duly instructed, take upon himself to consent to a compromise, which he, in the exercise of a sound discretion, judges to be for the interest of his client, the court will not inquire into the existence or the extent of his authority. I am extremely happy to find that the decisions abundantly bear us out.” But it is also declared that the compromise should be *bona fide*, prudent, and beneficial to the client.² The general rule in England, as thus stated, is sustained by numerous authorities.³

It is also said that the rule only extends to cases where he acts *bona fide*, and with reasonable care and skill, and for the best interests of the client, and the settlement is not made in defiance of the client's instructions,⁴ and this even after judgment, if the attorney be retained to obtain satisfaction of judgment,⁵ but not after judgment unless he is further retained in the action;⁶ and if a client be present during a compromise it will not be set aside on his allegation that he did not understand what was going on.⁷ But if the attorney is expressly instructed not to compromise a suit, a settlement by him is void, and not binding upon the client, even though reasonable and *bona fide* and for the benefit of the latter.⁸ If the attorney is authorized to compromise only on condition of securing a certain sum, as compromises for a larger one, this may be evidence of an agreement on his part to accept the surplus, in satisfaction of costs.⁹

¹ Swinfen v. Swinfen, 18 Com. B. 485; S. C. 1 Com. B. N. S. 364; S. C. 24 Beav. 549; S. C. De Gex & J. 381; Swinfen v. Lord Chelmsford, 5 Hurl. & N. 890. See Wharton on Agency, secs. 590, 591, 592.

² Chown v. Parrott, 14 Com. B. N. S. 74. See Fray v. Voules, 1 El. & El. 839.

³ See especially Butler v. Knight, Law R. 2 Ex. 103; Prestwick v. Poley, 18 Com. B. N. S. 806; Strauss v. Francis, Law R. 1 Q. B. 379; Story on Contracts, 8th ed. sec. 24, note; Thomas v. Harris, 27 L. T. N. S. 353; Ex parte Wanham, 21 Week. R. 104; Brady v. Curran, 2 Irish R. Com. Law, 314; Berry v. Mullen, Ir. R. 5 Eq. 368; Chambers v. Mason, 5 Com. B. N. S. 59.

⁴ Chown v. Parrott, 14 Com. B. N. S. 74; Priestwick v. Poley, 18 Ibid. 806; Strauss v. Francis, L. R. 7 Q. B. 379; Thomas v. Hewes, 2 Crompt. & M. 519; Brady v. Curran, I. R. 2 C. L. 314; Berry v. Mullen, Ibid. 5 Eq. 368.

⁵ Butler v. Knight, Law R. 2 Ex. 109.

⁶ Egan v. Rooney, 38 How. Pr. 121; Lewis v. Woodruff, 15 Ibid. 539. But see Bank v. Risley, 4 Denio. 480.

⁷ Chambers v. Mason, 5 Com. B. N. S. 59.

⁸ Fray v. Voules, 1 El. & E. 839.

⁹ Churchyard v. Watkins, 27 Law J. Ex. 13.

In New York and Maryland an attorney as such cannot settle a suit and give a

Chown v. Parrott, 14 Com. B. N. S. 74, was an action against *attorneys* for entering into a compromise by which judgment was rendered against the plaintiffs in an action in which they were defendants. It appeared that the attorneys had exercised due care and skill, and acted in a manner which they believed advantageous and beneficial to the plaintiffs; but they had no express authority from their clients to compromise the action. It was held the attorneys were not liable. Erle, C. J., said the rule of law was well established, that the general authority to conduct a cause gives the attorney authority to compromise. The reason why the compromise is held to be binding upon the client is, because the attorney is his general agent for that purpose. "I think," said he, "that is established by *Fray v. Voules*, 1 El. & E. 839; where it was held that an attorney who makes a compromise in defiance of the express directions of his client not to do so, is guilty of a breach of duty. The action lay against the attorney there because he was prohibited, which would seem to imply that if he had not been expressly prohibited from compromising, the compromise would have been a lawful act on his part." And in *Priestwick v. Poley*, 18 Com. B. N. S. 806, Byles, J., said that no authority had been cited to show that an attorney, who has the legal management of the cause, has not power in the *bona fide* exercise of reasonable care and skill to compromise the action in any manner he may find to be in the interest of the client, and the compromise was upheld.¹

The attorney has power to make *bona fide* compromises of his client's case, with the knowledge of the client, and in the absence of any dissent on his part.² But if the attorney has express directions from the client not to enter into a compromise, it has, on the other hand, been held that he has no power to do so, even though it be reasonable and *bona fide*, and for the benefit of the client; and if he does so, he is liable to an action for damages, though the damage actually sustained be nominal;³ nor is it

release concluding his client in relation to the subject in litigation. (*Barrett v. Third Avenue, etc.* 45 N. Y. 628; 8 Abb. Pr. N. S. 205; *Shaw v. Kidder*, 2 How. Pr. 244; *Maddux v. Bevan*, 39 Md. 485.)

¹ See, also, to same effect *Thomas v. Harris*, 27 L. J. N. S. Ex. 353; *In re Wood*; *Ex parte Wenham*, 21 Week. R. 104; *Brady v. Curran*, Irish Rep. 2 C. L. 314; *Berry v. Mullen*, Irish Rep. 5 Eq. 368; *Chambers v. Mason*, 5 Com. B. N. S. 59.

² *Chambers v. Mason*, 5 Com. B. N. S. 59; 5 Jur. N. S. 148; 28 L. J. C. P. 10.

³ *Fray v. Voules*, 1 El. & E. 839; 5 Jur. N. S. 1253; 28 Law J. Q. B. 232; 7 Week. R. 446; 33 L. T. 133.

any defense to such an action that the compromise was entered into by the advice of counsel employed by the attorney, under his retainer, for the conduct of the cause.

At all events, it seems to be agreed that such power of compromise is to be confined to the settlement of the particular suit, and does not include matters collateral.¹ Where counsel for defendant in an action alleged to have been prosecuted maliciously, agreed, without any authority from their client, that the dismissal of said action should be a bar to an action for malicious prosecution, it was held that such agreement was a nullity. The court said: "We suppose it will hardly be contended that when counsel are employed to defend in one action they can barter away their client's rights in another."²

It is laid down in American cases that an attorney has no authority arising from his employment in that capacity, no implied power, to compromise his client's claim, or to settle a suit and conclude the client, without the latter's consent.³ But a compromise acquiesced in for years by the principal will bind him forever.⁴ And the principle has been so far modified, that an agreement or compromise of a suit by an attorney, even though made without special authority, has not been interfered with unless it was so unreasonable as to warrant a belief that the attorney was imposed upon, or did not exercise his judgment fairly.⁵ There are numerous cases in the United States where

¹ *Strauss v. Francis*, Law R. 1 Q. B. 379; *Ex parte Wenham*, 21 Week. R. 104; *Dodd v. Dodd*, 9 Pa. 315; *Davidson v. Rozier*, 23 Mo. 387; *Holker v. Parker*, 7 Cranch, 436.

² *Marbourg v. Smith*, 11 Kan. 554; *Holker v. Parker*, 7 Cranch, 436; cases cited, *supra*. In a Maryland case it was held that an attorney at law has no power as such to compromise claims of his client by taking a bond, or anything except money, in satisfaction of them, or by receiving a less sum, or any security for a less sum, than is due on them, and such a compromise, if not expressly authorized, will not be binding on the client unless he has, with full knowledge, ratified it. (*Maddux v. Bevan*, 39 Md. 485.)

³ *Maye v. Cogdell*, 69 N. C. 93; *Stokeley v. Robinson*, 34 Pa. 318; *Abbie v. Rood*, 6 McLean, 106; *Holker v. Parker*, 7 Cranch, 436; *Spears v. Ledergerber*, 56 Mo. 465; *Adams v. Roller*, 35 Tex. 711; *Shaw v. Kidder*, 2 How. 244; *Barrett v. Third Avenue R. R. Co.* 45 N. Y. 628, 635; *Lewis v. Gamage*, 1 Pick. 347; *Derwort v. Loomer*, 21 Conn. 245; *Davidson v. Rozier*, 23 Mo. 387; *Filby v. Miller*, 25 Pa. 264; *Vail v. Jackson*, 13 Vt. 314; *Walden v. Bolton*, 55 Mo. 405; *Ambrose v. McDonald*, Sup. Ct. of Cal. Apl. 20, 1878, unreported.

⁴ *Mayer v. Foulkrod*, 4 Wash. C. C. 511.

⁵ *Potter v. Parsons*, 14 Iowa, 286; *Holker v. Parker*, 7 Cranch, 436; *Christie v. Sawyer*, 44 N. H. 298.

the attorney's right to compromise has been denied in terms more or less absolute.¹ There are, however, many cases to the contrary. In a recent case in California,² the power is somewhat extensively discussed, and the court say: "That in the United States the rule, as settled by an almost uniform current of authorities, is that an attorney, by virtue merely of his retainer as such, and without express authority from his client, has not the power to bind the client by the compromise of a pending action." But the court is clearly in error as to there being any "uniform current of authorities" to that effect. There are numerous authorities to the contrary.³

In *Holmes v. Rogers*,⁴ an action was brought to set aside a decree entered by the consent of the plaintiff's attorney, in pursuance of a compromise agreed upon by the attorney without the knowledge or consent of his client. The court upheld the decree on the ground that in the absence of fraud or mistake, a party to an action is bound by a judgment entered by the consent of his attorney, under the circumstances stated, and particularly if the attorney be not insolvent. The attorney in that case, without the knowledge or consent of his client, compromised the cause of action, and consented to the entry of a decree in accordance with the terms of the compromise.⁵

We think, however, that the weight of authority in the United States is against the general power of the attorney to bind his client by a compromise. In *Holker v. Parker*, (7 Cranch, 436) the client was ignorant of the compromise until after the entry of the judgment, and had not assented to it. The

¹ *Davidson v. Rozier*, 23 Mo. 387; *Holker v. Parker*, 7 Cranch, 436, 452; *Dodd v. Dodds*, 9 Penn. 315; *Derwort v. Loomer*, 21 Conn. 245; *Vail v. Jackson*, 13 Vt. 314; *Nolan v. Jackson*, 16 Ill. 272; *Doub v. Barnes*, 1 Md. Ch. 127; *Maddux v. Bevan*, 39 Md. 485; *Smith v. Dixon*, 3 Met. 438; *Smock v. Dude*, 5 Rand. 639; *Marbourg v. Smith*, 11 Kans. 562.

² *Preston v. Hill*, 50 Cal. 43.

³ See *Wieland v. White*, 109 Mass. 392; *Peru Steel Co. v. Whipple*, 109 Mass. 464; *Potter v. Parsons*, 14 Iowa, 286; *Christie v. Sawyer*, 44 N. H. 298; *Reinholt v. Alberti*, 1 Binn. 469; *Holmes v. Rogers*, 13 Cal. 191.

⁴ 13 Cal. 191.

⁵ An attorney employed to prosecute a suit for land has power to compromise the claim against the disseisor for *mesne profits* during the pendency of the suit, if the attorney deems it best for the interest of his client to avoid all the chances of litigation, and secure the speedy and successful termination of the principal suit in the most economical manner. (*Borney v. Morrill*, 57 Me. 368. See *Marco v. Low*, 55 Me. 549.)

court, Marshall, C. J., rendering the opinion, held that the client was not bound by the compromise and the judgment in pursuance of it, on the ground that the plaintiff's attorney had exceeded his authority. In the case in California, already cited, the client protested against the compromise before it was made, and against the entry of the judgment, in the presence of the court and of the opposing counsel. The court held that there was not only a want of authority in the attorney to make the compromise, but an active opposition to it by the client, of which the court and the opposing counsel were advised before the entry of judgment, and the attorney had no authority to make it.¹ That an attorney cannot, by virtue of his retainer, compel his client to submit to a compromise against his protest, made at the time and renewed in open court in presence of his adversary, before the entry of the judgment. Whatever presumptions the court or the adverse party might ordinarily be authorized to make, as to the authority of an attorney who proposes to compromise his client's cause of action, all such presumptions must cease when the client, before the transaction is consummated, notifies the court and his adversary, in a formal manner, that his attorney acted without authority, and that he repudiates the bargain. This doctrine under the circumstances, it would seem, can but meet with approval, and should, we think, be adopted.²

If an expression of opinion be deemed desirable, or will not be considered presumptuous, where so many distinguished authorities have differed, we should be decidedly in favor of the doctrine which denies in all cases the power of the attorney to compromise his client's cause without the latter's special authority, or express consent, or such silent acquiescence with full knowledge as amounts to a ratification. We should especially deny the attorney's power to compromise the cause in the face of any dissent or reluctance on the part of the client, however much to the latter's pecuniary interest the attorney may con-

¹ *Preston v. Hill*, 50 Cal. 43; S. C. 19 Am. R. 647.

² *Preston v. Hill*, 50 Cal. 43. See *Swinfen v. Swinfen*, 24 Beav. 549. See also, to the same effect, *Smith's Heirs v. Dixon*, 3 Met. (Ky.) 438; *Hudson v. Mitchell*, 14 Serg. & R. 307; *Stackhouse v. O'Hara*, 14 Pa. 88; *Stokely v. Robinson*, 34 Pa. 316; *Abbe v. Rood*, 6 McLean, 106; *Derwent v. Loomer*, 21 Conn. 245; *Davidson v. Rosler*, 23 Mo. 387; *Fitch v. Scott*, 3 How. (Miss.) 317. But acquiescence ratifies the compromise. (*Mayer v. Foulkrod*, 4 Wash. C. C. 511.)

sider the settlement to be. We admit the very extensive authority the attorney has in the control and management of the cause, and in this chapter have had occasion to dwell upon it; but that control is given him for the accomplishment of a purpose, and that purpose is the procurement of his client's claim, whatever it is, and the whole of it, and not a partial success or a mutilated remedy. If the client, after being fully advised in the premises, (and if the attorney thinks the compromise expedient, he should so advise) chooses to hazard the chances of an entire victory or a total defeat, we consider it a matter proper to be determined by him, and not his counsel. How the desired end is to be reached, is a matter for the most part for the counsel to determine. We have already seen that on the road to judgment the attorney has almost absolute management and control, which the client is almost powerless to interfere with; but we do not consider that all this confers upon the attorney any general authority to stop permanently at the half-way house of a compromise, or partial settlement. Whichever view, however, the reader may take of the question, he will not find it unsupported by authority; and we will only hazard one more remark, and that is, in view of the condition of the law, as shown by the authorities, it is scarcely prudent for the attorney to make a compromise which has not met in some way with the approbation of the client, as the attorney might, in any locality where the question is not clearly settled, be the victim of a decision adverse to the power, and be placed in the unpleasant attitude of a defendant in an action for damages at the instance of the client.

§ 229. Negligent compromise.—An attorney at all events is liable to his client for a negligent compromise, and for any damages the client may have sustained. The test is: Did the attorney, in making the settlement, act as good and diligent business men of his class are accustomed to act? If so, he may possibly be protected, although the compromise be set aside. If he did not show such care and diligence, then he is liable for the loss.¹

¹ Wharton on Negligence, sec. 749; *Chambers v. Mason*, 5 Com. B. N. S. 359.

§ 230. Notice of want of authority to compromise.—

The compromise is not binding on the client if the opposite party have notice of the attorney's want of authority, or if the terms of the compromise are such as to put the opposing party on inquiry. Had the attorney *apparent* authority to compromise? If so, then his client may be bound, unless the compromise was of so unfair a character as to imply fraud. Was the compromise so flagrantly unfair to the client as to make it impossible that the latter would have agreed to it? If so, the compromise is not binding.¹

§ 231. No compromise after judgment.—The power, whenever it exists, is based solely on the uncertainties of litigation. After the matter is made certain by judgment, the power to release or compromise is ended. The same remark applies to other liens; but perhaps in order to collect part of a very desperate judgment the attorney might be justified, even without authority, in releasing the remainder of the lien; but such a course is a dangerous one, and special authority should always be obtained if possible.²

§ 232. Authority to demand and receive payment.—

An attorney has authority, by virtue of his general retainer, to demand and receive payment of his client's money,³ and payment to the attorney is payment to the client.⁴ But no rule is better established than that, without express authorization, the attorney cannot receive anything but money in payment of a debt intrusted to him for collection.⁵ An attorney employed to collect

¹ *Preston v. Hill*, 50 Cal. 43; *Wharton on Agency*, sec. 594; *Holker v. Parker*, 7 Cranch, 436; *Stackhouse v. O'Hara*, 14 Pa. 88; *Filley v. Miller*, 25 Pa. 264; *Potter v. Parsons*, 14 Iowa, 286; *Brady v. Curran*, 2 I. R. C. L. 314; *Berry v. Mullen*, 5 I. R. Rep. 5; Eq. 368.

² *Wharton on Agency*, sec. 595; *Jones v. Ransom*, 3 Ind. 327; *Jenkins v. Gillespie*, 18 Miss. 31; *Pendexter v. Vernon*, 9 Humph. 84; *Wilson v. Jennings*, 3 Ohio St. 528. But see *Monson v. Hawley*, 30 Conn. 51; *Moulton v. Bowker*, 115 Mass. 36.

³ *Langdon v. Potter*, 13 Mass. 319; *Bryans v. Taylor*, Wright, 245; *Puckman v. Allwood*, 44 Ill. 183; *Ducett v. Cunningham*, 39 Me. 386; *Megary v. Funtis*, 5 Sand. 376.

⁴ *Ely v. Harvey*, 6 Bush, 620; *Carroll Co. v. Cheatham*, 48 Mo. 385.

⁵ *Huston v. Mitchell*, 14 Serg. & R. 307; *Wilkinson v. Holloway*, 7 Leigh, 277; *Moye v. Cogdell*, 69 N. C. 93; *Wright v. Daily*, 26 Tex. 730; *Givens v. Briscoe*, 3

a debt has no authority to release the sureties upon his client's claim,¹ or to receive other securities in payment of the demand,² or to sell or transfer the claim,³ or to receive part of the debt and a security for the balance.⁴ An attorney has no authority to receive a draft for money due, and if it proves worthless the client is not bound by his reception of it in lieu of money,⁵ nor can he receive his own nor another person's note in payment of a debt placed in his hands for collection.⁶

An attorney may, however, receive partial payments on a claim put in his hands for collection,⁷ but he cannot bind his client by an agreement to set off his own debt in part payment of a debt due the client.⁸ While the attorney of record of the plaintiff, in an action for the recovery of money, has authority to receive the amount of a judgment recovered by his client, and to discharge it,⁹ still he has no authority to execute a satisfaction of judgment on behalf of his client without payment; and even where the attorney holds the judgment by assignment, as security for debts due from the client, his satisfaction without payment is good only for the amount of his interest.¹⁰

The payment of a judgment or decree to the attorney who obtained it, before his authority is revoked and due notice of such revocation given to the defendant, is valid and binding on the plaintiff so far as the defendant is concerned. But it must be a payment of money, or if not, it must be accepted by the client in lieu of money, or the attorney must have special authority to receive it. Confederate States' Treasury notes were not such money as an attorney could receive in payment of his

Marsh, J. J. 524; *Kent v. Ricards*, 3 Md. Ch. 392; *Harper v. Harvey*, 4 W. Va. 539; *Trumbull v. Nicholson*, 27 Ill. 149.

¹ *Savings Inst. v. Chiner*, 7 Bush, 539.

² *Jeter v. Haviland*, 24 Ga. 252; *Walker v. Scott*, 13 Ark. 644.

³ *Rowland v. Stone*, 58 Pa. 196; *Noonon v. Gray*, 1 Bail. 437; *Card v. Walbridge*,

⁴ *Collet v. Challis*, 11 L. T. 245; 2 Ex. 484.

18 Ohio, 411; *Penniman v. Patchen*, 5 Vt. 346.

⁵ *Drain v. Doggett*, 41 Iowa, 682; *Bassett v. Hills*, *Ibid.* 682; *Greydon v. Patterson*, 13 Iowa, 256.

⁶ *Cooke v. Bloodgood*, 7 Ala. N. S. 683.

⁷ *Pickett v. Bates*, 3 La. An. 627.

⁸ *Child v. Dwight*, 1 Dev. & B. 171; *Chambers v. Miller*, 7 Watts, 63.

⁹ *Lewis v. Gamage*, 1 Pick. 347; *Brackett v. Norton*, 4 Conn. 517; *Canterberry v. Commonwealth*, 1 Dana, 416; *Wilson v. Stokes*, 4 Munf. 455.

¹⁰ *Beers v. Hendrickson*, 45 N. Y. 665.

client's debt without special authority from the client.¹ So, an attorney who has a claim for collection cannot without special authority take a bond instead of money as a satisfaction for a debt. And an attorney, who usually had taken judgments for the former guardian, and for that reason, after the writ had been executed and before it had been returned, instructed the sheriff to receive Confederate notes and other currency, in payment of the amount specified on its face, was held not authorized to do so.² But it has been inferred from facts and circumstances shown in evidence, that an attorney, during the civil war, was authorized by his client to receive payment on a claim in his hands in Confederate money, all the parties residing at the time within the Confederate lines.³

The attorney may receive payment of money on a claim left to be collected.⁴ Payment to the attorney is usually considered payment to the client.⁵ But an attorney in whose hands a claim is placed merely for collection, it not appearing that he is employed generally to act for the party, cannot, without special authority, delegate his power to collect to a third person.⁶ It follows from the general authority of the attorney to receive payment, that until the adverse party has notice of revocation of the attorney's authority, he will, except in those cases where special authority is necessary, be entitled to the credit of all payments made to the attorney.⁷

§ 233. Power to submit a cause to arbitration.—An agreement to refer a cause, or to arbitrate, comes within the scope of the attorney's general authority.⁸ So where an attor-

¹ *Harper v. Harvey*, 4 W. Va. 539; *Yoakum v. Tilden*, 3 Ibid. 167; *Smock v. Dade*, 5 Rand. 639; *Drain v. Doggett*, 41 Iowa, 682; *Bassett v. Hills*, Ibid. 682; *Graydon v. Patterson*, 13 Iowa, 256.

² *Aspaugh v. Jones*, 64 N. C. 29.

³ *Ellis v. Heptinstall*, 8 W. Va. 388. Payment in Confederate money, see *Johnson v. Gibbons*, 27 Gratt. 632; where creditor, having notice from the attorneys, and waiting twelve years without dissent, was concluded by the payment.

⁴ *Carroll Co. v. Cheatham*, 48 Mo. 385.

⁵ *Ely v. Harvey*, 6 Bush, 620.

⁶ *Danley v. Crawe*, 28 Ark. 95; *Kelly v. Norris*, 10 Ibid. 18.

⁷ *Harper v. Harvey*, 4 W. Va. 539; *Yoakum v. Tilden*, 3 Ibid. 167; *Wilkinson v. Holloway*, 7 Leigh, 277; *Baltimore Co. v. Fitzpatrick*, 36 Md. 624.

⁸ *Talbot v. McGee*, 4 Mon. 377; *Inhabitants of Buckland v. Inhabitants*, etc., 16 Mass. 396; *Scarborough v. Reynolds*, 12 Ala. 252; *Stokely v. Robinson*, 34 Pa

ney of record, in an action which had been sent to a referee by order of court, signed an agreement in writing that the report of the referee should be final, the client was held bound.¹ And where a court informed counsel that it was for the interest of parties that the cause be referred, and unless the party consented to a reference certain motions would be denied, the attorney was held authorized to consent to the reference, although the action was one of tort; and this on the ground that counsel may make such stipulations and agreements in reference to the proceedings in which he is retained as counsel usually make, and such as the court may require to be made and entered into as conditions of granting relief, and these agreements and stipulations bind the client, especially when entered into in open court; but it seems that the order of reference may be vacated at the discretion of the judge.² The general doctrine that an attorney may submit a cause to arbitration is limited to cases where there is a suit pending which he has been employed to manage,³ and the agreement to arbitrate should be precedent to the award, and be made in the cause in a formal manner.⁴

A reference of an action or controversy to arbitrators by an attorney, although without the knowledge or special authority of his client, is binding upon the client, arbitration being one of the legal modes of trying disputed questions to which the client's cause may be submitted by the attorney under his general authority to prosecute or defend. The attorney's agreements about continuances, about evidence, the conduct of the trial, and the like, will generally bind the client. He cannot accept a draft in payment of a judgment debt, payable in future, without special authority from his client.⁵ In England, it has been held

315; *Coleman v. Grubb*, 23 Pa. 393; *Holker v. Parker*, 7 Cranch, 436; *Abbe v. Rood*, 6 McLean, 106; *Brooks v. Durham*, 55 N. H. 559; *Alton v. Gilmanton*, 2 Ibid. 520; *Hanson v. Hoitt*, 14 Ibid. 56; *Spaulding's Appeal*, 33 Ibid. 479; *Pike v. Emerson*, 5 Ibid. 393; *Faviell v. Eastern Co.* 2 Ex. 344; 6 Dowl. & L. 54; *White v. Davidson*, 8 Md. 169.

¹ *Brooks v. Durham*, *supra*.

² *Tiffany v. Lord*, 40 How. Pr. 481.

³ *Jenkins v. Gillespie*, 10 Smedes & M. 31. See in Pennsylvania as to affecting title to real estate, *Houston v. Mitchell*, 14 Serg. & R. 307; *Naglee v. Ingersoll*, 7 Pa. 185; *Pearson v. Morrison*, 2 Serg. & R. 20.

⁴ *Stokeley v. Robinson*, 34 Pa. 315; *Holker v. Parker*, 7 Cranch, 449; *Wilson v. Young*, 9 Barr. 101; *Massey v. Thomas*, 6 Binn. 333.

⁵ *Morris v. Grier*, 76 N. C. 410; *Holker v. Parker*, 7 Cranch, 436; *Moye v. Cogdell*, 69 N. C. 93.

that the attorney has power to submit a case to arbitration, although the client desired it should not be done, the client's remedy in such cases being an action against the attorney for damages.¹ So he may modify the terms of submission when the client has agreed to refer, and may enlarge time for the arbitrators to make their award.² An authority to prosecute or defend a suit implies a power to refer it by rule of court.³ The general rule is that he may submit the matter in dispute to arbitration, because by the implied assent of his client, arising from his employment, he may do anything which the court may approve in the progress of the cause, when there is a suit pending.⁴ It is said that an agreement by counsel to refer or arbitrate will be sustained against the client's dissent.⁵

§ 234. Collateral matters.—An attorney cannot bind his client in collateral matters; as, for instance, the attorney is not competent to bind his client by a sale of the land sued for;⁶ nor to purchase land for his client at a judicial sale under the client's execution;⁷ nor to control the business of even foreign clients in matters extra forensic;⁸ nor can the attorney receive anything but money in the payment of a debt, unless expressly authorized.⁹ Hence a payment in depreciated bank paper does not bind the client.¹⁰ But permission to receive payment on

¹ *Thomas v. Hews*, 2 Crompt. & M. 327.

² *Rex v. Hill*, 7 Price, 630.

³ *Buckland v. Conway*, 16 Mass. 396.

⁴ *Jenkins v. Gillespie*, 10 Smedes & M. 31.

⁵ *Cabill v. Benn*, 6 Binn. 99; *Smith v. Bassard*, 2 McCord, 406; *Stokeley v. Robinson*, 34 Pa. 315; *Wader v. Powell*, 31 Ga. 1. But see *Markley v. Amos*, 8 Rich. 468.

⁶ *Corbin v. Mulligan*, 1 Bush, 297.

⁷ *Beardsley v. Root*, 11 Johns. 464; Wharton on Agency, sec. 582.

⁸ *Clark v. Kingsland*, 9 Miss. 248.

⁹ Wharton on Agency, sec. 583; *West v. Ball*, 12 Ala. 340; *Cost v. Genette*, 1 Port. 212; *Kent v. Ricards*, 3 Md. Ch. 392; *Wilkinson v. Holloway*, 7 Leigh, 277; *Wright v. Daley*, 26 Tex. 730; *Walker v. Scott*, 13 Ark. 252; *Lord v. Burbank*, 18 Me. 178; *Patten v. Fulbertson*, 27 Me. 58; *Child v. Dwight*, 1 Dev. & B. Eq. 171; *Treasurers v. McDowell*, 1 Hill (S. C.) 184; *Perkins v. Grauf*, 2 La. An. 328; *Phelps v. Preston*, 9 La. An. 488; *Campbell v. Baily*, 19 La. An. 172; *Garvin v. Lowry*, 15 Miss. 24; *Jeter v. Haviland*, 24 Ga. 252; *Huston v. Mitchell*, 14 Serg. & R. 307. But a payment, part in cash and part in a short note, of a person of undoubted responsibility, was sustained in *Livingston v. Radcliff*, 6 Barb. 201.

¹⁰ *West v. Ball*, 12 Ala. 340; *Chapman v. Cowles*, 41 Ala. 103; *Davis v. Lee*, 20 La. An. 248; *Trumble v. Nicholson*, 27 Ill. 189.

stocks or goods may be inferred from acquiescence in this mode of payment of prior installments of the same debt.¹

§ 235. Authority to stipulate that cause of action shall continue.—In an action to recover damages, defendant's counsel, as a condition of a continuance, stipulated that in case of the death of the plaintiff, before final judgment, the alleged cause of action should survive, and any verdict or judgment be regarded as if rendered in plaintiff's lifetime; and also that in case of such death, plaintiff's representatives might be substituted for plaintiff. The court held that the stipulation continued in force until final judgment, although meanwhile a verdict and judgment in plaintiff's favor had been set aside. The stipulation was one the attorney had power to make, and was binding on the client, especially as the stipulation was made by the court a condition of granting the continuance. It belonged also to the attorney's general authority to conduct the cause.² So, in an action in tort for an escape, the court, in putting off the trial of the cause on the application of defendant, on account of the absence of a material witness, required the defendant's counsel to stipulate, as a condition of granting the application, that the action should not abate if the defendant should die before the next term, it appearing that he was then afflicted with a mortal malady. The stipulation was held binding.³

If an attorney is employed in anticipation of a suit to be brought, when thus employed his client is bound by his stipulations in relation to it, to the same extent as if he stipulated after suit instituted. Especially after he has appeared, and the court, by rendering judgment, has recognized his right to appear, and the defendant, by paying a portion of the judgment, has recognized the same right.⁴

§ 236. Authority to agree to continuance.—An attorney has exclusive control of the conduct and management of a suit, and neither the party, nor his agent or attorney in fact, has au-

¹ *Patten v. Fullerton*, 27 Me. 58; *Baldwin v. Merrill*, 8 Humph. 132.

² *Cox v. Company*, 63 N. Y. 414, reversing S. C. 4 Hun. 176; 6 Thomp. & C. 405. See also *Gaillard v. Smart*, 6 Cowen, 385; *Gorham v. Gale*, 7 Cowen, 739; *Corning v. Southland*, 3 Hill, 552; *Gainsford v. Grammar*, 2 Camp. 9.

³ *Ames v. Webbers*, 10 Wend. 576; *Anderson v. Rome*, 54 N. Y. 335. See also *Griffith v. Williams*, 1 Crompt. & J. 47; *Palmer v. Cohen*, 2 Barn. & Adol. 966.

⁴ *Hefferman v. Burt*, 7 Iowa, 320.

thority to sign a stipulation for a continuance. But the attorney must be an attorney of the court; and the mere fact that the name is printed on the complaint as "of counsel" will not affect the matter, the printed names not being signatures; and when an attorney appears only as counsel in a case, he is not thereby authorized to sign a stipulation, as for a continuance, even if he be an attorney of the court. The conduct of a suit, except in a matter arising in the argument or hearing before the court, is exclusively under the control of the attorney of record. When a party does not choose to manage his cause personally, he can only do so by an attorney of the court. He cannot appoint an agent not an attorney of the court, and authorize such agent to represent him in the suit. But when a party makes his choice, and selects an attorney of the court to conduct and manage his cause, the attorney stands in his place. Until such attorney is changed or discharged, he has the exclusive control of the conduct and management of the cause. He may not be able to give a release and discharge in the cause of action, but he has exclusive control of the remedy, and may continue or discontinue it. His client cannot control him in the due and orderly conduct of the suit, and cannot appoint or authorize an agent to do it.¹

§ 237. Notice to attorney—Notice to client.—Notice to the attorney, whether actual or implied, is considered notice to the client, and the latter is bound.² But to charge the principal with implied notice of facts, because they were known to his attorney, the attorney's knowledge must be acquired during the existence of his agency. But notice to an agent or counsel employed by another person, in another business, at another time, will not be constructive notice to his principal or client employing him afterward.³ Nor is the client bound if the notice is received in any independent prior transaction.⁴

¹ *Nightingale v. Company*, 2 Sawy. 338; *Gaillard v. Smart*, 6 Cowp. 383; *Kellogg v. Gilbert*, 10 Johns. 220; *Anon.* 1 Wend. 108.

² *Pepper v. George*, 51 Ala. 190; *Worsley v. Scarborough*, 3 Atk. 392; *Warrick v. Warrick*, *Ibid.* 294; *Le Neve v. Le Neve*, *Ibid.* 650; *Lowther v. Carlton*, 2 *Ibid.* 242; *Lucas v. Bank*, 2 Stewt. 321; *Terrall v. Bank*, 12 Ala. 502; *Wharton on Agency*, sec. 584; *Bierce v. Red Bluff Hotel Co.*, 31 Cal. 160; *Allen v. McCalla*, 25 Iowa, 464; *Williams v. Tatnell*, 29 Ill. 553; *Haven v. Snow*, 14 Pick. 28; *Singleton v. Kent*, 8 Ala. 691. See *Campbell v. Benjamin*, 69 Ill. 244

³ *Ibid.*

⁴ *Hood v. Fahnestock*, 8 Watts, 489; *Spaight v. Cowne*, 1 Hem. & M. 359.

Notices should be served on the attorney and not on the client, who is not supposed to know their effect.¹ A notice does not bind if the attorney tells the opposite party that he will not communicate it to his client.² The mere employment of a solicitor to do a ministerial act does not bind the client by notice to the solicitor outside of such act.³ Offers made by the plaintiff's attorney in the hearing of a third person, to do an act relative to the defendant, which lay in the scope of his authority, are not admissible evidence to affect the plaintiff with such offer, but the rule is otherwise if the offer is made to the defendant.⁴ A constructive notice to an attorney is sometimes equally binding on the client as actual notice. An attorney in one case was agent for the grantor and grantee of an annuity, and subsequently for the purchaser in selling the estate on which the annuity was charged. An actual notice to him of the incumbrance was held a constructive notice to the intended purchasers. Their being infants was held not to affect the question.⁵

The attorney of a judgment-creditor, while his authority to enforce the judgment continues, is the proper person on whom to serve notice of any proceeding in the same action to avoid the judgment.⁶

¹ Wardell v. Eden, 2 Johns. Cas. 121.

² Sharpe v. Foy, 17 Week. R. 65.

³ Wyllie v. Pollen, 32 L. J. Ch. 782.

⁴ Wilson v. Turner, 1 Taunt. 398. See Truelove v. Burton, 9 Moore, 64; Ashbourne v. Price, 1 Dowl. & R. N. P. C. 48.

⁵ Toulmin v. Steere, 3 Mer. 228.

⁶ Sheldon v. Risedorph, 23 Minn. 518.

Notice to solicitor, notice to client, as applied to transactions.—A solicitor induced a client to advance money for A on a mortgage of land, and soon afterward induced a second client to advance money on mortgage of the same lands, without informing him of the existence of the first mortgage. The solicitor afterward left the country. The second mortgagee registered his mortgage first; but he was held to have notice through the solicitor—notice of the first mortgage—and could not by the prior registration obtain priority. (Rolland v. Hart, 6 Law R. Ch. 678; Boursot v. Savage, 2 Law R. Eq. 134. See Kennedy v. Green, 3 Myl. & K. 699; Agra Bank, Limited, v. Barry, 7 Law R. Eng. & I. Ap. Cas. 135.)

It has been often decided that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that of which his agent has actual

§ 238. Effect of judgment on authority.—It is said that the ordinary powers and authority of an attorney cease on the termination of the cause. After final judgment, his authority is limited to the receiving of satisfaction. For that purpose he may sue out execution.¹ It is said he has no implied authority to bind his client by an agreement made after judgment, to postpone execution.² He may, however, direct and manage the execution, and if goods have been siezed on the execution, he may order the sheriff to withdraw from possession.³ But if the defendant has been arrested on execution the attorney has no implied authority to discharge him from custody, unless the money has been paid for which the execution issued.⁴ The reason may be, that if the discharge was binding upon the creditor, he would lose his recourse against the person of the debtor; but if the client continues the authority of the attorney after judgment, he gives him the usual powers.⁵ The English Court of Exchequer has fully admitted the general proposition that the force of an attorney's retainer is at an end, and his power to bind his client ceases when judgment is recovered; and the court said: "We are bound by authority to admit it as a technical rule, but we are equally bound not to extend that rule one hair's breadth, since its effect on transactions in the relation of attorney and client is directly opposed to the common action and understanding of mankind in such matters. To whom does it ever occur, except to a technical lawyer, that unless something further is done to re-establish the attorney's authority, it ceases at judgment, and that without new instructions the steps necessary to obtain the fruits of litigation cannot be taken? It would be very mischievous to hold, in any case where evidence existed of the relation of attorney and client

notice. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance, because he was not told of it by the solicitor. Any kind of actual notice is better than a registration.

¹ *Macbeath v. Ellis*, 4 Bing. 578; *Langdon v. Potter*, 13 Mass. 319.

² *Lovegrove v. White*, Law Rep. 6 C. P. 440.

³ *Levi v. Abbott*, 4 Ex. 588.

⁴ *Savory v. Chapman*, 11 Ad. & E. 829; *Connop v. Challis*, 2 Ex. 484; *Lewis v. Gamage*, 1 Pick. 347.

⁵ *Butler v. Knight*, 2 Law R. Ex. 109.

having been continued or recreated, that the attorney had not authority to act according to the exigency of the case." The authority may be continued by any acts showing the client's intention that his attorney shall continue to act in that relation.¹

§ 239. Control over the judgment and execution.—An attorney, by virtue of his general employment, has no authority to discharge a judgment, unless on full payment of the amount;² nor to assign the judgment or execution;³ nor to consent to vacate a judgment which is pending and secured on appeal.⁴ His power, however, extends to opening a default which he has taken, and vacating the judgment, it is held, even though his client has instructed him to the contrary.⁵ Some cases hold that the attorney of a judgment creditor has implied authority to direct the sheriff as to the time and manner of enforcing the execution;⁶ to discharge a defendant from arrest on a *ca. sa.* issued by him;⁷ to stay execution upon a judgment,⁸ or to take out execution on a judgment recovered by him for his client, and to procure a satisfaction thereof by a levy on lands, or otherwise, and to receive the money due on the execution.⁹

It is said that the common-law doctrine is that the authority of an attorney ceases upon the rendition of the final judgment, except that for a year and a day he may enforce it.¹⁰ He cannot release damages,¹¹ nor prosecute a *scire facias* without a new warrant,¹² nor discharge a defendant from execution without ac-

¹ *Butler v. Knight*, 2 Law R. Ex. 109.

² *Beers v. Hendrickson*, 45 N. Y. 665; *Wilson v. Wadleigh*, 36 Me. 496; *Jewett v. Wadleigh*, 32 Me. 110; *Bank v. Govan*, 18 Miss. 35.

³ *Ibid.*

⁴ *Quinn v. Lloyd*, 36 How. 378; 5 Abb. N. S. 281.

⁵ *Read v. French*, 28 N. Y. 285; *Anon.* 1 Wend. 108; *Gaillard v. Smart*, 6 Cow. 383.

⁶ *Willard v. Goodrich*, 31 Vt. 597; *Gorham v. Gale*, 7 Cow. 739; *Erwin v. Blake*, 8 Peters, 18; *Lynch v. Commonwealth*, 16 Serg. & R. 368.

⁷ *Hopkins v. Willard*, 14 Vt. 474; *Scott v. Seiler*, 5 Watts, 235. But not without satisfaction. *Kellogg v. Gilbert*, 10 Johns. 220; *Simonton v. Barrell*, 21 Wend. 362.

⁸ *Silvis v. Ely*, 3 Watts & S. 120.

⁹ *Union Bank v. Geary*, 5 Peters, 98; *Erwin v. Blake*, 8 Peters, 18.

¹⁰ *Holbert v. Montgomery's Admsrs.* 5 Dana, 14; *Jackson ex dem. McCrea v. Bartlett*, 8 Johns. 361; *Kellog v. Gilbert*, 10 *Ibid.* 220; *Crary v. Turner*, 6 *Ibid.* 53; *Richardson v. Talbot*, 2 Bibb, 282.

¹¹ 1 Salk. 89.

¹² *Gonnigal v. Smith*, 6 Johns. 108; *Cro. Eliz.* 177; *Atwood v. Burr*, *Ld. Raym.* 1252.

tual satisfaction. After the rendition of a final judgment, it is held in Kentucky, that the original attorneys by whom the suit was prosecuted and defended have no authority resulting from their original employment, to consent to set it aside.¹ An attorney is not authorized by his retainer to satisfy a judgment without payment, and if he does so the court will set such satisfaction aside; and although an attorney should hold the judgment by assignment as security for debts due from his client, his satisfaction without payment is good only for the amount of his interest.²

An attorney cannot, by virtue of his general retainer, satisfy a judgment without payment of the *full amount in money*. If he takes anything else, or a less amount than the entire sum, the plaintiff is not bound.³ The burden of proof is upon an attorney to show that he was authorized to receive anything but money. No such authority is presumed.⁴

Where a debt is fully secured by levy upon property of the defendant sufficient to satisfy the judgment, the attorney is not permitted, without special authority, to discharge the lien of the judgment and execution, without receiving payment of the debt in full. And if the client repudiates the transaction immediately, and gives up securities taken by the attorney, the judgment will not be considered as discharged as against the defendant who knew the facts, and had, therefore, legal notice that the attorney exceeded the authority which he possessed under his general retainer. But the client should within a reasonable time signify his dissent, or the court may presume that the attorney had a special authority to so act, especially if the client receives the benefit of the security taken by the attorney on the compromise or settlement the latter makes.⁵

¹ *Holbert v. Montgomery's Admsrs.* 5 Dana, 11; *Herron v. Farrow's Heirs*, 7 B. Mon. 126.

² *Beers v. Hendrickson*, 45 N. Y. 665; *Lewis v. Woodruff*, 15 How. Pr. 539.

³ *Trumbull v. Nicholson*, 27 Ill. 149; *McCarver v. Nealy*, 1 Iowa, 360; *Smock v. Dale*, 5 Rand. 639; *Lewis v. Gamage*, 1 Pick. 347; *Vail v. Conant*, 15 Vt. 314; *Jewett v. Wardleigh*, 32 Mo. 110; *Beers v. Hendrickson*, 45 N. Y. 665; *Wilkinson v. Holloway*, 7 Leigh, 277; *Garthwaite v. Wentz*, 19 La. An. 196; *Lewis v. Woodruff*, 15 How. Pr. 539; *Wakeman v. Jones*, 1 Cart. 517; *Benedict v. Smith*, 10 Paige, 126; *Jackson v. Bartlett*, 8 Johns. 361; *Chapman v. Cowles*, 41 Ala. 103; *Jones v. Ransom*, 3 Ind. 327; *Abbe v. Rood*, 6 McLean, 107.

⁴ *Portis v. Ennis*, 27 Tex. 574.

⁵ *Benedict v. Smith*, 10 Paige, 126; *Givins v. Briscoe*, 3 J. J. Marsh. 532; *Wickliff v. Davis*, 2 Ibid. 71; *Greenville v. Roberts*, 7 La. 66.

Under the ordinary employment to collect a claim by suit, an attorney cannot release or postpone the lien on lands resulting from the possession of the claim to judgment, nor can an honest belief that the release or postponement will be for the client's benefit, supply the want of authority to make such arrangement. The authority for such action must be express or implied beyond the mere retainer to sue and collect the claim.¹ An attorney has no right to purchase real estate under his client's execution for such client, unless thereto specially authorized.²

The attorney of an execution creditor has full authority to direct an officer as to the time and manner of enforcing the execution,³ and it is said that the attorney's authority does not cease with the entry of judgment in so far as he has a right to issue an execution, although he has no right to discharge such execution without receiving satisfaction. Proceedings in the execution are said to be proceedings in the suit, and the attorney may postpone the execution on the judgment against the indorser of a note, and issue one on the judgment against the maker.⁴ An attorney may take out execution upon a judgment recovered, and procure a satisfaction thereof by a levy on lands or otherwise, and receive the money due on the execution, and thus discharge the execution,⁵ but he cannot stay an execution when it would have the effect to release a surety.⁶

Plaintiff's attorney has power under his original retainer to authorize an officer holding a *fi. fa.* issued by him to depart from the regular and ordinary course of executing it;⁷ and he has control over the execution in every respect. He may withdraw it from the hands of the sheriff, or suffer it to become dormant, or authorize the officer to depart from the usual course of his duty.⁸ He has authority to direct or consent that goods

¹ *Wilson v. Jennings*, 3 Ohio St. 528.

² *Washington v. Johnson*, 7 Humph. 468.

³ *Jenney v. Delesdernier*, 20 Me. 183; *Lynch v. Commonwealth*, 16 Serg. & R. 368; *Gorham v. Gale*, 7 Cowen, 739; *Nebb v. White*, 18 Tex. 572; *Willard v. Goodrich*, 31 Vt. 597; *Kimball & Co. v. Geary*, 15 Vt. 414.

⁴ *Union Bank v. Geary*, 5 Peters, 98; *Read v. French*, 28 N. Y. 285; *Silves v. Ely*, 3 Watts & S. 420.

⁵ *Erwin v. Blake*, 8 Peters, 18.

⁶ *Bank v. Govan*, 18 Miss. 333; *Givens v. Briscoe*, 3 J. J. Marsh. 532.

⁷ *Corning v. Southland*, 3 Hill, 552.

⁸ *Ibid*; *Read v. French*, 28 N. Y. 293; *Waters v. Sykes*, 22 Wend. 564.

levied upon, being of a perishable nature or liable to be pilfered, be sold by the sheriff, and the proceeds kept for distribution.¹

In a case where the attorney of the plaintiffs in an action on a promissory note agreed with the defendant, whose intestate was indorser of the note, that if she would confess judgment, and not dispute her liability upon the note, he would immediately proceed by execution to make the amount from the drawer, the principal debtor, who he assured her had sufficient property to satisfy the same; it was held that this agreement fell within the scope of the general authority of the attorney, and was binding upon the plaintiff. Subsequently it was ascertained that the defense of the indorser could not have been sustained, but this was held to make no difference, for the consideration of the promise of the attorney to proceed by execution against the drawer was the relinquishment of a defense which the defendant at the time considered legal and valid.²

§ 240. Authority to satisfy judgment.—An attorney is not authorized by his general retainer to satisfy a judgment without payment, and if he does so, the court will set aside the satisfaction; and although an attorney should hold the judgment by assignment, as security for debts due from his client, his satisfaction without payment is good only for the amount of his interest.³ So he may not receive less than the face of the judgment in full satisfaction, without express authority so to do, unless in cases where the judgment-creditor has known of his action and not repudiated it for a long period of time. Thus, an attorney agreed to receive a sum of money and certain collaterals less than the face of a judgment in its satisfaction. After a lapse of ten years, and without any demand being made by the judgment-plaintiff, or any steps taken to collect the judgment, it was presumed that the attorney had authority to so act, or that plaintiff had ratified his attorney's course.⁴

§ 241. Vacating judgment.—After judgment is entered, an attorney may bind his client by consenting to open the judg-

¹ *Nelson v. Cook*, 19 Ill. 440.

² *Union Bank v. Geary*, 5 Peters, 98.

³ *Beers v. Hendrickson*, 45 N. Y. 665; *Lewis v. Woodruff*, 15 How. Pr. 539; *Carter v. Talcott*, 10 Vt. 471; *Penniman v. Patchin*, 5 Vt. 346.

⁴ *Reid v. Dickinson*, 37 Iowa, 56.

ment; though, if he does so without consulting his client, he may be liable for any loss which his negligence in this respect may have caused.¹

§ 242. Authority after judgment.—When the attorney undertakes acts out of the usual range of his duties, the presumption of authority, based upon his general employment, no longer applies. Parties dealing with him in such cases are put upon their inquiry as to his authority. If they do not inquire, their loss is imputable to their own negligence.² So far as concerns the judgment-debtor, such acts as releases without payment are void, if unauthorized.³

But an attorney may do an act which would be collusive and void as to the opposing party, yet good as to innocent strangers. The attorney may enter satisfaction on his client's judgment, and if he does so corruptly or negligently, and without consultation, this will not release the judgment-debtor. But if *bona fide* purchasers from the judgment-debtor buy his real estate when the judgment on it is certified to be satisfied, the rule is otherwise. Such purchasers are entitled to regard the entry as releasing the judgment-creditor's lien, wherever the practice is to enter such satisfaction by attorney.⁴ But if the attorney is employed to try a litigated issue, his general authority may be regarded as terminated with the trial of the case. If he is employed to collect a debt, this implies as great a discretion vested in him after judgment as before.⁵

The continued employment of the attorney after judgment may be regarded as vesting in him authority to collect the judg-

¹ Wharton on Agency, sec. 587; *Clussman v. Merkel*, 3 Bosw. 402; *Read v. French*, 28 N. Y. 285; *Quinn v. Lloyd*, 5 Abb. Pr. N. S. 281; 36 How. Pr. 378.

² *Harrow v. Farrow*, 7 B. Mon. 126; *Jewett v. Wadleigh*, 32 Me. 110; *Banks v. Evans*, 18 Miss. 10; *Smedes & M.* 35; *Union Bank v. Govan*, 18 Miss. 10; *Smedes & M.* 333; *Averill v. Williams*, 4 Denio, 295; *Webb v. White*, 18 Tex. 572; *Lovegrove v. White*, Law. R. 6 Com. P. 253. An attorney employed to collect a debt, on which he causes suit to be brought, resulting in a sale of land upon execution, can do no act after the time for redemption has expired, without new authority, and if he then receives and pays redemption money to the plaintiff in execution, who has previously transferred the certificate, he will be liable to the defendant therefor. (*McLain v. Watkins*, 43 Ill. 24.)

³ *Kellogg v. Gilbert*, 10 Johns. 220; *Simonton v. Barrell*, 21 Wend. 362; *Givens v. Briscoe*, 3 J. J. Marsh. 532; Wharton on Agency, sec. 588.

⁴ Wharton on Agency, sec. 588; *Wycoff v. Bergen*, 1 Coxe, 214.

⁵ *Ibid*; *McDonald v. Todd*, 1 Grant, 17; *Butler v. Knight*, Law R. 2 Ex. 109.

ment by the usual modes, and to use the usual expedients for that purpose.¹

§ 243. Authority over auxiliary proceedings.—An attorney is only authorized to appear and act for his client in the proceedings which constitute a part of the action. He has no authority to appear for the party in other proceedings not forming essentially a part of the action; particularly when they partake of a criminal nature and involve his liberty. A proceeding relative to a contempt is a new proceeding, requiring new authority to the attorney. He has no general authority to accept service of an order to show cause in proceedings against the party for contempt. Personal service is necessary.² The attorney has no authority to assign a judgment, unless special authority be given. Still, if it is assigned by the attorney to defendant for full amount, no execution can issue on the same, and the remedy of the client is said to be against the attorney.³

Under a general retainer, an attorney of record is authorized to prosecute the suit to judgment, and may also issue execution and receive the money for which judgment is recovered, and upon receipt of the money may discharge the party, and acknowledge satisfaction of the judgment; but still it seems not to be the duty of the attorney under such a retainer to do more than perfect the judgment which is a termination of the suit.⁴

§ 244. Powers of law partners.—It appears that a law partnership does not confer on any of the partners the exten-

¹ *Jenney v. Delesdernier*, 20 Me. 183; *Read v. French*, 28 N. Y. 285; *Erwin v. Blake*, 8 Peters, 18; *Scott v. Seiler*, 5 Watts, 235; *Lynch v. Com.* 16 Serg. & R. 388; *Nelson v. Cook*, 19 Ill. 440; *Corning v. Sutherland*, 3 Hill, 552; *Hyams v. Michel*, 3 Rich. 303; *Hopkins v. Willard*, 14 Vt. 474; *Gorham v. Gale*, 7 Cowen, 739; *Willard v. Goodrich*, 31 Vt. 597; *Day v. Wells*, 31 Conn. 344; *Steward v. Biddlecum*, 2 N. Y. 103. See *Silvis v. Ely*, 3 Watts & S. 420; *Hollington Ex parte*, 43 Law J. Ch. 99; *Jewett v. Wadleigh*, 32 Me. 110.

² *Pitt v. Davison*, 37 Barb. 97; *Headley v. Good*, 24 Tex. 232; *Walradt v. Maynard*, 3 Barb. 584.

³ *Maxwell v. Owen*, 7 Cold. 630. An attorney who receives a note from his client to collect, is warranted by his general retainer to bring a second suit on the note, after being nonsuited in the first for want of sufficient proof of the execution of the note. (*Jackson v. Wilson*, 12 Johns. 317.)

⁴ *Adams v. Fort Plain Bank*, 23 How. Pr. 58; *Stewart v. Biddlecome*, 2 Comst. 106; *Harris v. Osborne*, 2 Crompt. M. & R. 629; *Rothers v. Manning*, 1 Barn. & Adol. 15; *Berthold v. Fox*, 21 Minn. 51.

sive powers of mercantile associations. The partners have not in the ordinary course of business an implied power to bind each other by bills of exchange signed with the name of the firm in the mode prevailing among merchants, nor has one of the firm a power to bind another by an undertaking given in the name of the firm in a professional capacity on behalf of a client, it not being an ordinary transaction.¹

When a client retains a firm, he is presumed to be entitled to the united exertions of all the partners. The firm may give notice to the client that they will no longer be concerned for him, and then be entitled to their fees; but by the voluntary retirement of the firm, the joint retainer given in any one case is discharged, and if the client substitute a new attorney, he is entitled to have the papers delivered over to such new solicitor for the purpose of the cause, without previous payment of the costs, saving to the former solicitors, or any of them, their lien on the papers for their costs incurred;² and it would seem that on grounds of breach of confidence either of the firm formerly employed by the client might be restrained from acting against him.³ Changes in a firm of attorneys, moreover, sometimes affect the lien of the partners for costs. As where a firm of two transacted business for a client till a certain date, after which time the firm joined with them another partner and continued to act for the client, obtaining possession of fresh papers of the

¹ *Hadley v. Bainbridge*, 3 Q. B. 316; 2 Gale & D. 483; 11 Law J. N. S. 483; *Hazleham v. Young*, 5 Q. B. 833; 1 Dav. & M. 700; 8 Jur. 338; 13 Law J. Q. B. 205. See *Livingston v. Cox*, 6 Barr. 360. An attorney cannot bind his partner by a promise to indemnify an officer for committing a person to jail, but it may sometimes be inferred that he acted for both, and a subsequent ratification by the other partner will bind him. (*Marsh v. Gold*, 2 Pick. 285.) But an attorney who has received notes for collection is individually responsible for care and diligence in the collection, although he gives his client notice that he has associated with him a partner who attends to the collecting; unless the client has recognized the partnership in the transaction of his business. (*Mardis v. Shackelford*, 4 Ala. 493.) A claim was placed in the hands of two attorneys, who were partners in the practice of law, for collection. Judgment was obtained, and of the debtor was sold under execution, and redemption from the sale was made by paying the money to the sheriff, who paid it over to one of the attorneys. Prior to the redemption, the law co-partnership between the attorneys was dissolved. Held, that both the partners were liable to the client for the money thus received by one of them after the dissolution. (*Smyth v. Harvie*, 31 Ill. 62.)

² *Cook v. Rhodes*, 19 Ves. 273; 3 Ves. & B. 177; *Griffiths v. Griffiths*, 12 Law J. N. S. 397; 2 Hare, 587.

³ *Cholmondeley v. Clinton*, 19 Ves. 261.

firm, it was held that no lien attached on these papers for costs due to the former firm.¹ A member of a law firm, where the business is conducted in his name solely, may sue in his own name for a demand due the firm.² But the party sued may set off a demand against the firm.³

If attorneys who are copartners accept a retainer, the contract is joint, continuing to the termination of the suit. Neither can be released from the obligations they have assumed, so far as their clients are concerned, by a dissolution of the firm, or any other act or agreement between themselves.⁴ They are equally responsible for moneys collected and not paid over, though one of them had no participation in the particular transaction.⁵ Demand on one is also constructively a demand on both, and renders both liable; and so if one does the business of the client unskillfully, both are liable to him in damages, if the facts are such as to constitute any liability at all.⁶ But the contract is determined by the death of one of the partners.⁷

§ 245. Powers of law clerks.—Attorneys do not appear at liberty to entirely delegate to clerks the duties intrusted to them by clients, even though the clerks be what are called managing clerks.⁸ A clerk commencing business for himself cannot be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having, in his former service, acquired information likely to be prejudicial to the clients of his master.⁹ There are, however,

¹ *In re Forsham*, 17 Law J. Ch. 61.

² *Platt v. Hulen*, 23 Wend. 456.

³ *Lansing v. McKillus*, 7 Cowen, 416.

⁴ *Walker v. Goodrich*, 16 Ill. 341; *Morgan v. Roberts*, 38 Ill. 65.

⁵ *Dwight v. Simon*, 4 La. An. 490.

⁶ *McFarland v. Crary*, 8 Cowen, 253; *Warner v. Griswold*, 8 Wend. 665; *McGill v. McGill*, 2 Met. (Ky.) 258; *Livingston v. Cox*, 6 Pa. 360.

⁷ *McGill v. McGill*, 2 Met. (Ky.) 258.

⁸ But sometimes, in the absence of the attorney, the clerk is supposed to represent him as to all ordinary business of the office. Such, at least, seems to be the New York plan. (*Power v. Kent*, 1 Cowen, 211; see *Anon.* 1 Caines, 73; *Rathbone v. Blackford*, 1 Caines, 343; *Cooper v. Carr*, 8 Johns. 360; *Paddock v. Beebe*, Cole. 135; 2 Johns. Cas. 117; *Tremper v. Wright*, 2 Caines, 102; *Jackson v. Yale*, 1 Cowen, 215.)

⁹ *Briehen v. Thorp*, 1 Jacob, 300; *Corning v. Cooper*, 7 Paige, 587.

various acts which the clerk is deemed authorized to perform. Thus the clerk is usually considered the authorized agent of his master, in actions at law, to accept service of notices, and to receive such service; and what is said by him in the office in the course of business, as to acceptance of process, may be taken to be said by him as agent, and the principal is not generally at liberty to repudiate it.¹ Where a clerk is intrusted with the management of a trial, any arrangement made by him at the time of trial is equally binding as if it were made by the attorney himself.² The clerk, like any other sub-agent, is only liable to his immediate principal. He is not accountable to the client for money received by him on behalf of the master acting professionally for the client; but he is so far regarded as the confidential agent of the client that he cannot disclose privileged and confidential communications made to him by the client.³

An attorney's managing clerk, in the absence of the attorney, represents him as to all the ordinary business of the office; and the acts and declarations of the clerk, in matters within the scope of his agency, will bind the principal. And so where, during the principal's absence, he received an amended replication, and agreed to waive the formality of a rule for such amendment, it was held binding upon the attorney.⁴ But however extensive the general powers of a clerk, he cannot discontinue an action without the consent of the principal,⁵ nor bind the client by a discharge without satisfaction of a debt due the latter:⁶ and indeed, even the attorney's authority does not extend that far.

§ 246. Employment of substitutes.—It is within the general authority of an attorney to employ subordinates, but not substitutes. The only exceptions appear to be in cases of actual necessity, or where the interests of the client are clearly pro-

¹ *Fowler v. Roe*, 4 Dowl. & L. 639.

² *Baker v. Black*, 8 L. T. Ex. 393.

³ *Mills v. Oddy*, 6 Car. & P. 728; *Jackson v. French*, 3 Wend. 339; *Parker v. Carter*, 4 Munf. 273; *Stephens v. Babcock*, 3 Barn. & Adol. 357.

⁴ *Power v. Kent*, 1 Cowen, 211; *Sibley v. Waffle*, 16 N. Y. 183; *Birkbeck v. Stafford*, 14 Abb. Pr. 285.

⁵ *Irvine v. Spring*, 7 Rob. (N. Y.) 293.

⁶ *Carter v. Talcott*, 10 Vt. 471; *Penniman v. Patchin*, 5 Vt. 346.

moted, as where the expenses of a journey may be saved.¹ The foundation of this rule is, that the attorney's employment is one of special trust, and should not be delegated without the client's special consent.² An attorney, by virtue of his ordinary powers, cannot delegate his authority to another so as to raise a privity between such third person and his principal, or to confer on him, as to his principal, his own rights, duties, and obligations.³

Although, by the employment of an attorney at law to conduct a cause, a personal trust and confidence is reposed which cannot ordinarily be delegated to another, except by the consent of the first employer, yet a delegation made without authority may be afterward assented to by the party interested, with full knowledge of the facts, and if it is, it is as binding on him as if made with full authority. Or if proper information be soon given to the person interested of such unauthorized delegation, and he do not dissent from it, he will be held to have acquiesced in it. Silence in such case amounts to a ratification. But in a case where no information of the delegation was given until nearly three years had elapsed, and then only on application of the person interested, although no dissent was expressed, still no ratification was presumed.⁴

An attorney may substitute another in his place and stead if the client knows of the substitution, and either accepts the services or does not object, and he is bound by the substitution; and in an action by an attorney on a special contract for professional services, under the general allegation of performance, the plaintiff may prove performance by substitution with the defendant's consent. Such proof entitles the plaintiff to a recovery as if the contract had been fully performed by the plaintiff in person.⁵ Especially in the absence of the employer the attorney may, if

¹ *Power v. Kent*, 1 Cowen, 211; *Birbeck v. Stafford*, 14 Abb. Practice R. 285; 23 How. Pr. 236; *McEwen v. Mazyck*, 3 Rich. 210; *Cook v. Ritter*, 4 E. D. Smith, 253.

² *In re Bleakley*, 5 Paige, 311; *Hitchcock v. McGhee*, 7 Port. 556; *Johnson v. Cunningham*, 1 Ala. 249; *Kellogg v. Norris*, 10 Ark. 18; *Ratcliff v. Baird*, 14 Tex. 43; *Polland v. Rowland*, 2 Blackf. 22.

³ *Johnson v. Cunningham*, 1 Ala. N. S. 249.

⁴ *Hitchcock v. McGhee*, 7 Port. 556; *King v. Pope*, 28 Ala. 602; *Bank v. Corcoran*, 2 Peters, 132; *Bell v. Cunningham*, 3 Peters, 81; *Owings v. Hall*, 9 Peters, 629; *Amory v. Hamilton*, 17 Mass. 109; *In re Bleakley*, 5 Paige 311.

⁵ *Smith v. Lipscomb*, 13 Tex. 537; *Butler v. Allcorn*, 8 Tex. 56; *Johnson v. Cunningham*, 1 Ala. 249; *King v. Pope*, 28 Ala. 601.

necessary, engage assistant counsel, and such counsel may charge his fees to the attorney or the client. But if the party be present, or his authorized agent, he should employ the assistant counsel, and without his consent the attorney managing is not authorized to employ the assistant. It is a question of fact to be submitted to the jury whether there was any such employment, and if services were rendered, whether they were to be performed gratuitously or to be paid for.¹ Yet it is said the attorney in a case has not power as such to employ assistant counsel in the suit at the expense of his client, and an employment by him will not bind his client, unless it can be fairly inferred from the facts of the case that such authority was given by the client. This doctrine is distinguished from those cases where an attorney combines the character of an agent generally, and of an attorney to attend to the cause in court.²

An attorney, then, has no implied authority to retain associate counsel, and charge his client with liability for their fees, without consulting the client, if the client be present, or where he can be easily communicated with; nor has he, under the same circumstances, any implied authority to employ a substitute to act in his place.³ But if the employer be absent and inaccessible, the attorney employed to manage a suit may engage assistant counsel, especially if the appointment be necessary to protect the client's interests; and such counsel may charge his fees to the attorney or his client.⁴ So subsequent acquiescence will be treated as ratification.⁵ So while, as a general rule, an attorney has not, as incidental to his employment, the power to pledge the credit of his client by employing counsel or another attorney as an assistant,⁶ yet where the facts in a particular case are such that it may fairly be inferred from them that

¹ *Briggs v. Georgia*, 10 Vt. 68.

² *Paddock v. Colby*, 18 Vt. 485; distinguished from *Briggs v. Georgia*, *supra*.

³ *Paddock v. Colby*, 18 Vt. 485; *Voorhies v. Harrison*, 22 La. An. 85; *Cook v. Ritter*, 4 E. D. Smith, 253; *Scott v. Hoxsie*, 13 Vt. 50; *In re Bleakley*, 5 Paige, 311; *Hitchcock v. McGehee*, 7 Port. 556; *Johnson v. Cunningham*, 1 Ala. 249; *Gillespie's Case*, 3 Yerg. 525; *King v. Pope*, 28 Ala. 601; *Smith v. Lipscombe*, 13 Tex. 532; *Briggs v. Georgia*, 10 Vt. 68; *Fenno v. English*, 22 Ark. 170.

⁴ *Briggs v. Georgia*, 10 Vt. 68, and cases cited *supra*.

⁵ *Ibid*.

⁶ *Willard v. Danville*, 45 Vt. 93; *Mostyn v. Mostyn*, Law Rep. 5 Ch. Ap. 457; *Cook v. Ritter*, 4 E. D. Smith, 253; *Matter of Bleakley*, 5 Paige, 311.

such an authority was given, the general rule should yield.¹ Where an attorney employs counsel, it is a question of fact whether he did not become personally liable for his fees, although for the benefit of his client.² But if the client be present at the trial he is liable for services of counsel, although there was a secret agreement by the attorney that he would pay them.³ An attorney who becomes disqualified to act cannot complete the performance of his subsisting professional engagements by means of a substitute, though his clients assent to the substitution; because, what a person cannot in law do by himself, he cannot do by another.⁴ Where a note is placed in an attorney's hands to collect, under a general retainer, he cannot delegate his authority to a third person, and authorize him to collect it; and payment by the maker to such third person will not discharge him.⁵ Where an attorney employed to defend a suit is, after some progress, compelled by circumstances to retire from the cause, and he engages the services of a substitute who performs the duty, an action is maintainable by him for the whole services rendered. If the client is dissatisfied with the substitution, it is his duty to tender compensation for the services already rendered, and rescind the contract of employment.⁶ Where one attorney confided a note to another for collection, and took his receipt, but without giving instructions with respect to the ownership, and after the money was collected it was remitted to the payee of the note, whose name, however, was indorsed on the note; this remittance—the payee not being the owner—was held not to discharge the collecting attorney from liability to his immediate principal, nor will the action of the latter for the money be defeated by proof that he was himself the agent for the indorsee, unless that person has asserted his right to the money as against his agent.⁷

¹ Willard v. Danville, *supra*; Brigham v. Foster, 7 Allen, 419.

² Serace v. Whittington, 2 Barn. & C. 11.

³ Brigham v. Foster, 7 Allen, 419.

⁴ Batcliff v. Baird, 14 Tex. 43.

⁵ Kellogg v. Norris, 10 Ark. 18. Where an attorney receives a demand for collection, and without the client's knowledge delivers it to another attorney, who collects and fails to pay it over, the first attorney is liable for the money. (Pollard v. Rowland, 2 Blackf. (Ind.) 22; See Commins v. McLain, 2 Ark. 402; Herron v. Bullitt, 3 Sneed. (Tenn.) 497.)

⁶ Fenno v. English, 22 Ark. 170.

⁷ Lewis v. Peck, 10 Ala. 142.

By the death of an attorney, the power of his substitute necessarily ceases. If an attorney has power to compromise, his duly appointed substitute has the same power.¹ An attorney cannot recover of his client fees of counsel associated with him, without proving his employment of such counsel at the client's request, or that with his sanction he, the attorney, has paid the fees.² When a party engages the services of particular attorneys, or of an association of attorneys, he is entitled to the services of every one of them; and if one abandons the cause with the express or implied consent of the others, or they attempt to supply his place with another of equal or superior qualifications, it will be no performance of the contract. And this, on the ground that it is a personal duty and trust which cannot be delegated.³ Where an attorney employed to conduct a suit employed another attorney to assist him, but not professing to employ him in behalf of his client, and it not appearing that he had authority so to do, and that he was the only person who did employ him, it was held that the employer was personally responsible without proof of an express promise.⁴

§ 247. Ratification by client.—As in the law of principal and agent, ratification by the client of the acts of his attorney must be after full knowledge of the fact, otherwise it is not effective; a ratification by a client of his attorney's acts outside of the latter's authority is invalid, if made without knowledge of all the circumstances.⁵ But, subject to these qualifications, ratification, and even silent acquiescence, will have the usual effect.⁶ But silence will not be construed as ratification if the acts are promptly repudiated.⁷ Where it is held that an attorney has no power, by virtue of his general retainer, to compromise a debt, still if the client accepts the fruit of the compromise

¹ *Peries v. Aycinena*, 3 Watts & S. 64.

² *Cook v. Ritter*, 4 E. D. Smith, 253.

³ *Morgan v. Roberts*, 38 Ill. 65.

⁴ *Scott v. Hoxie*, 13 Vt. 50.

⁵ *Williams v. Reed*, 3 Mass. 405; *Garvin v. Lowry*, 13 Miss. 24. See *Narragansett v. Wentworth*, 36 Me. 339; *Brooks v. Poirier*, 10 La. An. 512; *Chataque Co. Bank v. Risley*, 4 Denio, 480.

⁶ *Maddux v. Bevan*, 39 Md. 485; *Brown v. Platt*, 8 Bosw. 324; *Mason v. Stewart*, 6 La. An. 736.

⁷ *Lewis v. Woodruff*, 15 How. Pr. 539.

with full knowledge of it, and without dissent, this may amount to a ratification, and is equivalent to a previous authority.¹

§ 248. Duration of authority.—An attorney once appointed continues in that character until judgment, or other termination of the suit;² or until his death, or removal by the client;³ or until the client's own death;⁴ for the courts do not usually recognize a retainer expiring in the middle of the proceedings,⁵ the attorney of record being the proper person to receive the fruits of the execution, and to enter satisfaction after payment,⁶ and the attorney cannot at this more than at any other stage of the proceedings, abandon his client and act for the opposite side.⁷ The act, however, must be one connected with the main action, for where a *scire facias* is necessary to remove a judgment, a fresh authority is necessary, the proceeding being in the nature of a new action.⁸ New authorization is also requisite to justify bringing a writ of error.⁹ The attorney cannot enter satisfaction on the roll without payment,¹⁰ nor release damages,¹¹ nor discharge the defendant from execution without payment.¹²

¹ *Simple v. Atkinson*, 64 Mo. 504; *Benedict v. Smith*, 10 Paige, 126.

² *Lawrence v. Harrison*, Comb. 40; *Payne v. Chute*, 1 Roll. R. 366; *Style*, 426;

³ *Johns*. 361; 8 *Peters*, 113; 1 *Greenl.* 257.

⁴ 1 *Chitt. R.* 193.

⁵ *Co. Litt.* 52b; *Palmer v. Reiffenstein*, 1 M. & G. 96; 2 Pa. 689; 3 *Mont.* 566.

⁶ 2 *Inst.* 378; *Lee v. Ayrton*, Peake, 117; *Russell v. Palmer*, 2 *Wils.* 325; 4 *Burr.* 2061; *Bevins v. Hulme*, 15 *Mees. & W.* 88; 3 *D. & L.* 722; 15 *Law J. Ex.* 226. An attorney in Pennsylvania has very extensive power in relation to conducting a suit, but after judgment this plenary power in a great measure ceases, except as to his power in receiving the amount of the judgment, and giving a receipt for it. (*Stackhouse v. O'Hara's Executors*, 14 Pa. 89; *Babb v. Stromberg*, *Ibid.* 397; *Somers v. Balabrega*, 1 *Dall.* 164; *Reinholdt v. Alberti*, 1 *Binn.* 467.) He may discharge a defendant from arrest on *ca. sa.*, (*Scott v. Seiler*, 5 *Vt.* 235) or direct the sheriff as to the time and mode of sale on an execution, (*Lynch v. Commonwealth*, 16 *Serg. & R.* 368). But he cannot take land for the debt of his client. (*Huston v. Mitchell*, 14 *Serg. & R.* 307; *Stackhouse v. O'Hara's Executors*, *supra*. See *Willis v. Willis' Administrators*, 12 Pa. 159.)

⁷ *Crozer v. Pilling*, 4 *Barn. & C.* 34; 6 *Dowl. & R.* 26; *Gray v. Wass*, 1 *Greenl.* 257; *Anon.* 12 *Mod.* 440.

⁸ *Lawrence v. Harrison*, *Styles*, 426.

⁹ *Hussey v. Welby*, *Sayers*, 218; *Cro. Eliz.* 177; 2 *Ld. Raym.* 1048.

¹⁰ *Batchelor v. Ellis*, 7 *T. R.* 337; *Parsons v. Gill*, 2 *Ld. Raym.* 896. That an attorney's authority to act for a distant client continues until the litigation is ended, see *Love v. Hall*, 3 *Yerg.* 408; as to appeals, see 1 *Pick.* 462; 1 *Over.* 343, 299; 5 *Paige*, 530; 5 *Cowen*, 35.

¹¹ *Davis v. Jones*, 5 *Dowl.* 503.

¹² 1 *Roll. Abr.* 291, l. 10.

¹³ *Savory v. Chapman*, 11 *Ad. & E.* 829; 3 *Perry & D.* 604; 8 *Dowl.* 656; 9 *Law. J. Q. B.* 186.

The payment must be in money, and not anything in lieu of money.¹

It is a rule sustained by numerous authorities that the authority of the attorney ceases with the termination of the suit and the entry of judgment,² and it is equally true that in the absence of special circumstances the authority continues by virtue of the original retainer, until the final termination of the cause. The client may terminate it before, and so may the attorney after reasonable notice; but in absence of proof to the contrary, the presumption is that it continues until the litigation is ended.³ It follows as a consequence of the doctrine that the attorney's authority ceases with the determination of the cause, that a party may sue out a writ of execution, *scire facias* or error by a different attorney, without giving notice of the change.⁴ But while the cause is pending, the court, for the protection of the attorney, will not permit a party to change his attorney without at least first paying the charges,⁵ and until notice of change of attorney has been given to the opposite party, such party is entitled to treat the former attorney as still the attorney in the cause.⁶ After judgment, the attorney employed has no authority to revive or reverse the judgment without another warrant of attorney.⁷ The plaintiff's attorney, from his general character as attorney, has no authority to discharge the defendant from execution on a *ca. sa.* until the money is paid. His general authority ceases with the judgment, or at least with the issuing of an execution within the year.⁸ After final judgment the plaintiff may employ a different attorney to commence gar-

¹ 1 Desaus. Eq. 469; 1 Hill, 184.

² Daingerfield's Executors v. Thurston's Heirs, 8 Martin N. S. 232; Berthold v. Fox, 21 Minn. 51; Kronschole v. Knoblauch, 21 Minn. 56; Egan v. Rooney, 38 How. Pr. 121; Jackson v. Bartlett, 8 Johns. 361. See Kellogg v. Gilbert, 10 Johns. 220; Gorham v. Gale, 7 Cowen, 789.

³ Bathgate v. Haskins, 59 N. Y. 533; Lush v. Hastings, 1 Hill, 656; Mygatt v. Wilcox, 45 N. Y. 306; Whitehead v. Lord, 11 Eng. L. & Eq. 588.

⁴ Tipping v. Johnson, 2 Bos. & P. 357; Burr v. Atwood, 1 Salk. 89; Batchelor v. Ellis, 7 T. R. 337; Thorp v. Fowler, 5 Cowen, 446; McLaren v. Charrier, 5 Paige, 530; State v. Gulick, 17 N. J. L. 435.

⁵ Langley v. Stapleton, Barnes, 40; Witt v. Ames, 11 Week. R. 751; 8 L. T. N. S. 425.

⁶ Powell v. Little, 1 W. Black. 8; Lewis v. Sumner, 13 Met. 269.

⁷ Richardson v. Talbot, 2 Bibb. 382.

⁸ Jackson v. Bartlett, 8 Johns. 361. See Kellogg v. Gilbert, 10 Johns. 220; Gorham v. Gale, 7 Cowen, 789.

nishee proceedings to collect it, without a formal substitution.¹

The authority of an attorney is terminated by the death of the client; and the subsequent continuance of the suit in the name of his representatives without their consent is unwarranted.² The authority may also be terminated by the death of the attorney, or his removal or suspension from office, or his ceasing to act as attorney, or his removal from the State,³ or after rendition of judgment in the cause.⁴ But it continues until final judgment is actually perfected, and prior to this service of papers on him, though after the entry of a rule vacating the judgment is regular, such a rule not being a final judgment, and its effect being to leave the action still pending, until judgment shall be finally entered of record.⁵ After the docketing of the judgment, his general authority ceases, to the extent at least that an execution may be issued by a new attorney without substitution. But unless his authority is expressly revoked, it continues incidentally for the purpose of enforcing the judgment, if any.⁶

§ 249. Termination of the relation of attorney and client, and consequent termination of authority.—The relation of attorney and client is usually terminated by the termination of the particular proceeding or business for which he was employed.⁷ If the attorney, however, is appointed to try a par-

¹ Hinkley v. Company, 9 Minn. 55.

An attorney employed to collect a debt, prosecuted suit which resulted in a sale of land upon execution. After the time for redemption had expired, he received and paid redemption money to the plaintiff in execution, who before that time had transferred the certificate: it was held that the relation of attorney and client ended after the time for redemption expired, and that the attorney could do no act in the matter without new authority, and that the attorney was liable to the defendant in execution for the money so received. (*McLain v. Watkins*, 43 Ill. 24. See *Smyth v. Harvie*, 31 Ill. 62.)

² *Wood v. Hopkins*, 2 Pa. 689; *Campbell v. Kincaid*, 3 Moore, 68. See an exception to this rule, but under very peculiar circumstances, in *Booth v. Steer*, 7 Jur. 678; 1 Dowl. & L. 374; *Poole v. Steed*, 11 Mees. & W. 759.

³ *Chautauqua County Bank v. Risley*, 6 Hill, 375.

⁴ 2 Inst. 378; *Macbeath v. Ellis*, 4 Bing. 578; 1 Moore & P. 513.

⁵ *Lusk v. Hastings*, 1 Hill, 656.

⁶ *Lusk v. Hastings*, 1 Hill, 656; *Nichols v. Dennis*, R. M. Charl. 188; *Gray v. Wass*, 1 Me. 257; *Flanders v. Sherman*, 18 Wis. 575.

⁷ *Adams v. Bank*, 23 How. Pr. 45; *Bathgate v. Haskin*, 59 N. Y. 533; *Love v. Hall*, 3 Yerg. 408; *Langdon v. Castleton*, 30 Vt. 285; *Jackson v. Bartlett*, 8 Johns. 361; *Richardson v. Talbot*, 2 Bibb. 382; *Gray v. Wass*, 1 Greenl. 257; *Hinkley v. Falls*, 9 Minn. 55.

ticular case, he is not entitled to withdraw when the trial is finished, if it be proper or prudent to take an appeal or move for a new trial, and his client be at such a distance or in such a condition that he cannot be consulted. The attorney should take measures to have the judgment reviewed.¹ The relation is also terminated by the attorney's death, and the opposite party, before taking any new proceedings, should give to the party left unrepresented notice to appoint a new attorney.²

The authority of an attorney usually continues until the end of the litigation, unless he is for some good reason dismissed by his client.³ His authority to act cannot be ended by his own voluntary act to his client's detriment.⁴ After the death of the client, which terminates the attorney's authority, he cannot give nor receive notice of motions in the cause before the successor, made a party in due form, has authorized him to act.⁵ In some of the United States, it is held that an attorney's authority terminates with the entry of judgment for his client;⁶ but in other States, it is said that his authority continues until judgment is satisfied, unless it be previously revoked by the client.⁷ In England, also, the authority has been said to cease at the entry of the judgment, and that the attorney has no implied authority to make a binding agreement to stay execution, nor effect a valid compromise of the judgment.⁸

§ 250. Revocation of authority, and change and substitution of attorney; general rules.—The authority of an attorney, like that of any other agent, is revocable; and the courts

¹ *Bathgate v. Haskin*, 59 N. Y. 533; *Bach v. Ballard*, 13 La. An. 487.

² *Ryland v. Noakes*, 1 Taunt. 342; *Ashley v. Brown*, 1 Lown. M. & P. 451; 15 Jur. 399; *Lord v. Wardle*, 3 Com. B. 295; *Given v. Driggs*, 3 Caines, 150; *Hildreth v. Harvey*, 3 Johns. Cas. 300.

³ *Langdon v. Castleton*, 30 Vt. 285.

⁴ *Love v. Hall*, 3 Yerg. 408.

⁵ *Putnam v. Van Buren*, 7 How. 31; *Austin v. Monroe*, 4 Lans. 67; *Balbi v. Duvet*, 3 Eden, 418; *Judson v. Love*, 35 Cal. 163; *Gleason v. Dodd*, 4 Met. 333; *Risley v. Fellows*, 10 Ill. 531; *Campbell v. Kincaid*, 3 Mon. 566; *Succession of Liles*, 24 La. An. 490.

⁶ *Hincley v. St. Anthony Falls*, etc. 9 Minn. 55; *Jackson v. Bartlett*, 8 Johns. 361; *Adams v. Bank*, 23 How. 45; *Egan v. Rooney*, 38 How. 121; *Richardson v. Talbot*, 2 Bibb, 382.

⁷ *Gray v. Wass*, 1 Me. 257; *Nichols v. Dennis*, R. M. Chart. 188; *Flanders v. Sherman*, 18 Wis. 575.

⁸ *Lovegood v. White*, Law R. 6 C. P. 440; *Butler v. Knight*, Law R. 2 Ex. 109.

or a judge will, on due proof of the client's authority, make an order to change the attorney at any stage of the proceeding.¹

It is held that the order to change is usually only necessary in proceedings strictly within the province of the attorney before employed. It appears not to be necessary in any proceedings taken after judgment, such as issuing an execution, or a *scire facias*, entering satisfaction, bringing a writ of error, or moving to set aside a judgment.² In case of a firm of attorneys, one of whose names appears on the record, an order to change the attorney is not necessary on a subsequent dissolution of the partnership.³ After the death of the attorney of record, although no formal order or rule is necessary, notice to the opposite party of the appointment of a new attorney should be given, or the party may be treated as suing or defending in person;⁴ but the proceedings taken by a new attorney, after the death of the attorney originally employed, without any formal notice of his appointment being served, will not be set aside for irregularity.⁵

When an attorney is changed, or one substituted for another, by leave of the court, if the court consent, the consent should be filed, or an order entered substituting the new attorney, and notice of the order should be served upon the opposite party.⁶ The object of the practice is, that there may be some person to whom the adverse party may look. But when a

¹ Glanville, lib. 11, chap. 3; *Walcott v. Vouchee*, 3 Bing. 423; *Davies v. Loundes*, 3 Com. B. 808; *Wells v. Hatch*, 43 N. H. 246; *Hazlett v. Gill*, 5 Robt. 611; *Wolf v. Trochelman*, Ib. 611; *Faust v. Repoor*, 15 How. Pr. 570.

² *Rex v. London*, 2 Barn. & Adol. 604; *Tipping v. Johnson*, 2 Bos. & P. 357; *Doe v. Bransom*, 6 Dowl. 490; *Marr v. Smith*, 4 B. & A. 466; *Batchelor v. Ellis*, 7 Term Rep. 337.

³ *Farley v. Hebbes*, 3 Dowl. 538.

⁴ *Bradley v. Breach*, 2 Keb. 275; *Jenk. 179*; *Style*, 13; *Collins v. Arnold*, 1 B. C. R. 217; *Ryland v. Noakes*, 1 Taunt. 342.

⁵ *Dord v. Wardle*, 3 Com. B. 295.

⁶ This doctrine obtained in England at an early period. (*Ray. 69*; *Com. Dig. Att'y B. 9*; *Oates v. Woodward*, 1 Salk. 87, pl. 6; *Reg. Gen. H. 16 Vict. R. 4*; *Mich. 1654, R. 10 K. B. C. P. R. 13*; 1 *El. & B. App. xxvi*; *May v. Pike*, 4 Mees & W. 197; 6 *Dowl. 667*; *Guiders v. Moore*, 1 Barn. & C. 654; 8 *Hen. VI, 8*; 24 *Edw. III, fol. 37*. See *Bloomer v. Bransom*, 6 *Dowl. P. C. 490*; *Gilmour v. Brindley*, 7 *Dowl. & R. 259*; *Langley v. Staple*, *Barnes*; 40; *Krekeler v. Thaulé*, 47 *How. Pr. 138*; *Ryland v. Noakes*, 1 *Taunt. 342*; *Robeston v. McClellan*, 1 *How. Pr. 70*; *Dalon v. Lewis*, 7 *How. Pr. 132*; *Macpherson v. Robinson*, 1 *Doug. 217*; *Davies v. Loundes*, 3 *Com. B. 808*; *Wynne v. Wynne*, 2 *Scott N. R. 615*; 9 *D. P. C. 396*; *Farley v. Hebbes*, 3 *D. P. C. 538*; *Rex v. Middlesex*, 2 *D. P. C. 147*; *Darnell v. Harrison*, 1 *Har. & J. 139*.)

party appears in court by a new attorney, to show cause against a rule served on him, it has been held that the omission to serve the order to change the attorney cannot be objected to.¹ The former attorney's lien appears to continue notwithstanding the change, so that he has a right to insist on the costs being taxed in order to secure the fruits to himself.²

A party has no right arbitrarily to change his attorney without paying the costs earned; and the original attorney is not bound to consent to a substitution, or deliver papers upon which he has a lien, until the amount of his just demands is ascertained by a court or referee and paid.³ But when a solicitor has abandoned a cause, or when not faithful to it, or when he acts in a manner that is inconsistent with the trust that is reposed in him, the court will give its consent that the solicitor be changed, and order that he deliver up the papers without payment of fees.⁴ A party has a general right to change his attorney, and a rule for that purpose will usually be granted, leaving to the attorney the advantage of any lien he may have on papers or money in his hands, as security for his fees and disbursements.⁵

The usual mode of changing an attorney is by a rule, calling on the former attorney to show cause why another should not be appointed in his stead. Notice of the order changing the attorney must be given to the adverse party, which is usually done by service of the order.⁶ The order may be drawn upon payment of the attorney's bill of costs to be taxed. In case of non-payment, the attorney, it is said, may apply to rescind the order,⁷ and proceed in the action, if his costs are not paid within a reasonable time. When an attorney is discharged by his client, but not on the ground of misconduct, the court will not restrain

¹ *Lovegrove v. Deymond*, 4 Taunt. 809.

² *Newton v. Harland*, 4 Scott N. S. 769; See *Merriweather v. Mellish*, 13 Ves. 161; *Twort v. Dayrell*, *Ibid.* 295.

³ *Board v. Brodhead*, 44 How. Pr. 411, 426; *Bolton v. Tate*, 1 Swanhst. 84; *Mumford v. Murray*, 1 Hopkins, 369; *Hoffman v. Van Nostrand*, 14 Abb. 331; *Parker v. Williamsburg*, 13 How. 250. As to what protection will be accorded the original attorney, see *Stevenson v. Stevenson*, 3 Edw. 340; *Cregler v. Cheesborough*, 25 How. Pr. 200; *Gardner v. Taylor*, 5 Abb. Pr. N. S. 33; S. C. 36 How. Pr. 63.

⁴ *Sloo v. Law*, 4 Blatchf. C. C. 268.

⁵ *In re Paschal*, 10 Wall. 483.

⁶ *Com. Dig. Att'y B. 9.*

⁷ See *Langley v. Stapleton*, Barnes, 40; *Merryweather v. Mellish*, 13 Ves. 161; *Twort v. Dayrell*, *Ibid.* 295; 1 J. C. R. 22; 2 Paige, 276; 4 Paige, 501.

him from acting for the opposite party, unless it clearly and distinctly appear that he has obtained information in the former character which it would be prejudicial to the cause of his former client to communicate.¹

The client, it has been held, must, on obtaining the order to change his solicitor, undertake to pay the amount of his bill of costs.² The new solicitor may, however, proceed before the former solicitor's claim for costs is actually satisfied, or even taxed; but the lien exists, though the cause cannot be stopped.³ The attorney may be required to exhibit papers, when necessary, for the purpose of the cause, or for the inspection of the client.⁴ If one attorney appears and pleads, another cannot make any application to the court, without an order of substitution, and unless the substitution be properly made, the acts of the substituted attorney may be invalid;⁵ not, however, where the effect would be to oppress a party acting meritoriously.⁶

Notice of the substitution must be given to the opposite party, and must be served personally on such party or his counsel.⁷ In interlocutory proceedings, the objection that an attorney is not of record must be, when purely technical, fully sustained in fact.⁸ Numerous authorities hold that a substitution will not be permitted unless the costs of the first attorney have been paid.⁹

¹ *Johnson v. Marriott*, 2 Crompt. & M. 183; 2 Dowl. P. C. 343; 4 Tyr. 78; *Grissell v. Peto*, 2 M. & S. 568; 9 Bing. 1; *Bricheno v. Thorp*, 1 Jacob. 300. See *Davis v. Clengle*, 8 Sim. 262. But where an attorney abandons his client of own accord, the courts may interfere and prevent his acting for the opposite side. (*Cholmondeley v. Clinton*, 19 Ves. 261.)

² *Moire v. Mundie*, 1 Stu. 312.

³ *Merryweather v. Mellish*, 13 Ves. 161; *Twort v. Dayrell*, 13 Ves. 195; *O'Dea v. O'Dea*, 1 Schoales & L. 315; *Creswell v. Byron*, 14 Ves. 272.

⁴ *Mayne v. Watts*, 3 Swanst. 93; *Moire v. Mundie*, *supra*.

⁵ *Ginders v. Moore*, 1 Barn. & C. 654; *Jerome v. Bowman*, 1 Wend. 393; *King v. Archer*, 2 B. C. R. 192; 5 Dowl. & L. 412.

⁶ *Gerry v. Fisher*, 6 East, 549; *Margarell v. Makilwaine*, 2 N. R. 509; *Bloomer v. Branson*, 6 D. P. C. 490; *Fuller v. Brown*, 10 La. An. 350; *Thorp v. Fowler*, 5 Cowen, 446; *State v. Gulick*, 17 N. J. L. 435.

⁷ *Given v. Driggs*, 3 Caines, 300; *Hildreth v. Harvey*, 3 Johns. Cas. 300; *Dorlon v. Lewis*, 7 How. Pr. 132; *Bogardus v. Richtmeyer*, 3 Abb. Pr. 179; *Grant v. White*, 6 Cal. 55; *Roussin v. Stewart*, 33 Cal. 208.

⁸ *Lord v. Wardle*, 3 C. B. 295.

⁹ *Witt v. Ames*, 11 Week. R. 751; 8 L. T. N. S. 425; *Sloo v. Law*, 4 Blatchf. 268; *Mumford v. Murray*, Hopk. Ch. 369; *Hoffman v. Van Nostrand*, 14 Abb. Practice R. 336; *Stevenson v. Stevenson*, 3 Edw. Ch. 340; *Gardner v. Taylor*, 5 Abb. Pr. N. S. 83; 3 C. 36 How. Pr. 63; *Supervisors v. Broadhead*, 44 How. Pr. 411;

Although a party in an action may have no right to change his attorney without leave of the court,¹ yet the court will usually grant leave on the request of the party, but not without consulting the rights of the attorney, and will not allow the change until the just claims of the latter are discharged or secured. In case of substitution of attorney, it is held in New York sufficient to serve the notice of substitution without serving the order.² Where, at different stages of the case, different attorneys had acted for one of the parties, without notice of substitution, the service of notice upon the last acting attorney, he being of record and recognized by the court, was considered sufficient.³

Where a party changes his attorney in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record.⁴ A new attorney may issue execution in his own name without any formal substitution.⁵ When the attorney has died, or the notice has been given to the party to appoint a new attorney and he neglects to do so, notice of any proceeding in the cause may be given to the party personally.⁶

§ 251. In England.—No attorney can be changed without the order of a judge or of the court. The order must be served

Carver v. U. S. 7 Ct. of Cl. 499; Pleasants v. Kortrecht, 5 Heisk. 694; Walton v. Sugg, Phill. (N. C.) 98. See In re Paschall, 10 Wall. 483. When the lawyer resists the application of the client for a substitution, the court is to determine the validity of the cause for substitution. (Sloo v. Law, 4 Blatchf. 268; Arrington v. Sneed, 18 Tex. 135.) Negligence is sufficient cause for sustaining the application. (Walsh v. Shumway, 65 Ill. 472.)

¹ *Hoffman v. Van Nostrand, 14 Abb. Pr. 338; Macpherson v. Robinson, 1 Doug. 217; Twort v. Dayrell, 13 Ves. Jr. 196; Mumford v. Murray, Hopk. Ch. 369. See Trust v. Repoor, 15 How. Pr. 570.*

² *Bogardus v. Richtmeyer, 3 Abb. Pr. 179.*

³ *Roussin v. Stewart, 33 Cal. 208.*

Where the court granted a motion for substitution of attorneys on the application of a client, upon condition that the client pay the sum found by the reference to be due to the attorney, and the attorney, upon the sum being thus ascertained, tendered a substitution with the papers in the action, demanding payment of such sum, and the client then changed his mind and concluded to make no change, the court considered that it had no power, by summary proceedings, to compel the party to accept the substitution and pay the money. (*Gardner v. Tyler, 5 Abb. Pr. N. S. 33; S. C. 36 How. Pr. 63.*)

⁴ *Grant v. White, 6 Cal. 55.*

⁵ *Thorp v. Fowler, 5 Cowen, 446.*

⁶ *Hoffman v. Riley, 13 Abb. Pr. 399.*

on the opposite party.¹ It is the invariable practice not to allow the attorney of record to be changed unless the costs of the first attorney have been paid, and the fact that such attorney has other sufficient security for his costs is no reason for departing from the rule.² After proper notice, all pleadings, notices, writs, orders, rules, and other proceedings, are to be delivered to or served upon such substituted attorney.³ Objections that interlocutory proceedings are not taken by attorneys of record, or properly substituted attorneys, are of a strict nature, and it is incumbent on the party making them to establish them distinctly. It is an irregularity for a defendant to take a declaration out of the office by one attorney and plead by another, without an order for changing the attorney. If no such order has been obtained and served, the court will set aside the plea.⁴ But if the opposite party treat the new attorney as the attorney in the cause, he cannot afterward object that no order was made.⁵

A party called on to show cause may oppose the rule in person or by a new attorney, without notice to the other party of the order to change his attorney.⁶ A plaintiff may sue out execution by a different attorney, without an order to change,⁷ and a defendant may bring error without such an order.⁸ When an order for changing an attorney on payment of costs has been made, and the attorney gives up the client's papers without the costs being paid, the court will not grant an attachment for their non-payment.⁹ If there is an order for changing upon payment of the first attorney's bill upon taxation and delivery up of papers, the first attorney is entitled to the possession of it to enable him to enforce payment of his bill.¹⁰

¹ *Rex v. Middlesex*, 2 D. P. C. 147; *Reg. Gen. Q. B. C. P. and Ex. H. T.* 16 Vict. r. 34; 1 El. & B. App. III; *Macpherson v. Robinson*, 1 Doug. 217.

² *Witt v. Ames*, 11 Week. R. 751; 8 L. T. N. S. 425; *Reg. Gen.* (*supra*).

³ *Lord v. Wardle*, 3 Com. B. 295; 15 Law J. Com. P. 259.

⁴ *King v. Archer*, 1 B. C. R. 219; *Perry v. Fisher*, 6 East, 549; *Gimers v. Moore*, 1 Barn. & C. 654; *Margerem v. McKilwaine*, 2 N. R. 509.

⁵ *Farley v. Hebbs*, 3 D. P. C. 538; 1 Har. & W. 203. Upon an application to change the attorney when the client is unacquainted with the English language, the affidavits must clearly show that the purport and object of the motion are known to and sanctioned by the client. (*Davies v. Lowndes*, 3 Com. B. 808.) It is no objection to such an application that it is made after final judgment.

⁶ *Lovegrove v. Dymond*, 4 Taunt. 669.

⁷ *Tipping v. Johnson*, 2 Bos. & P. 357; *Perry v. Fisher*, 6 East. 549.

⁸ *Batchelor v. Ellis*, 7 T. R. 387.

⁹ *Handy v. Collett*, 7 D. P. C. C. 599; 3 Jur. 870; 2 W. W. & H. 63.

¹⁰ *Alger v. Hefford*, 1 Taunt. 38. See *Newton v. Harland*, 4 Scott N. R. 769.

In the English courts of common law, a client, after he has retained an attorney, and such attorney has acted in a cause, cannot change him without leave of the court. If he is changed without an order of court, the opposing party may still consider him the acting attorney.¹ Neither attorney can interfere except by the consent of the first, or in the event of his death.² Nor can an attorney be changed until his costs are paid.³ When an attorney is substituted, the fact should appear upon the records.⁴ For the purpose of changing an attorney a summons is taken out, and a judge's order obtained thereon. A copy of the order is served on the opposite attorney. No new warrant of attorney is necessary.⁵ Upon the death of an attorney notice is given to the opposite party of the appointment of the new attorney before he can proceed in the cause.⁶ Notice of justification of bail by a new attorney, changed without order of court, is not allowable.⁷ The Court of Exchequer appears to take no notice of the immediate attorney in a cause, as the proceedings are carried on there in the name of the clerk in court.⁸

Where a writ was issued in the name of two attorneys, a declaration in the name of one of them was held good, without any formal substitution; and the same principle was applied where two attorneys were partners, and the partnership was afterward dissolved, and the other partner took proceedings, which were recognized by the adverse attorney. The court refused to set aside the proceedings for want of an order to change the attorney.⁹ The substituted attorney must take notice, at his peril, of all rules and laws to which the former attorney would have been liable had he not been changed.¹⁰

¹ *Anon.* 7 Mod. 50; *McPherson v. Robinson*, 1 Doug. 217; *Powell v. Little*, 1 W. Black. 8.

² *Anon.* 2 Rol. 456.

³ *Langley v. Stapleton*, Barnes, 40.

⁴ *Anon.* 12 Mod. 440; *Sayers*, 218.

⁵ *Wood v. Plant*, 1 Taunt. 44.

⁶ *Ryland v. Noakes*, 1 Taunt. 342.

⁷ *Hill v. Roe*, 2 Marsh. 257; 6 Taunt. 532. But see *Plomer v. Houghton*, 2 Barn. & Ald. 604.

⁸ *Hopkins v. Peacock*, 5 Price, 558.

⁹ *Armstrong v. King*, 8 Dowl. O. S. 297; *Farley v. Hebbs*, 3 Ibid. 538; 1 Har. & W. 203.

¹⁰ *Macpherson v. Rorison*, Doug. 217; *Anon.* 7 Mod. 50; *Kaye v. De Mattos*, 2 W. Black. 1323; *Powell v. Little*, 1 Ibid. 8; *Ginders v. Moore*, 1 Barn. & C. 654.

As to the acts of the substituted attorney, in case the change is not made in the manner pointed out by statute or otherwise, and proper notice given, the opposite party and his attorney are justified, under such circumstances, in considering the original attorney as still employed. They are not obliged to take notice of any proceedings by the substitute, unless the proceeding is sanctioned in some way by the court. So payment to the substitute in such case may not be good payment to the client, and notice of justification of bail, or a plea put in by an attorney irregularly substituted, have been held to be also irregular.¹ But in criminal cases it has been held that when a defendant is a prisoner, notice of justification of bail may be given by a new attorney, without an order for changing the former attorney.² The opposite party may waive any irregularity, as by accepting a notice or pleading, and retaining it, or in any way treating the substitute as the attorney in the cause.³ Generally, however, if a notice of motion to the court for any purpose be given by a new attorney, without a due substitution and notice thereof, the motion will be denied with costs.⁴

In the English chancery it appears a client may change his solicitor without a previous order of court, and though the solicitor may retain the papers in his possession as a lien for his costs, yet he cannot stop the progress of the cause until he is paid.⁵ The client may appoint another solicitor or sworn clerk, and the former one must produce the papers for the purposes of the suit.⁶ The client has the right of inspection of those papers at reasonable times, while they are in the possession of his first solicitor.⁷ As a solicitor is not allowed to assign the business of

¹ *Ginders v. Moore*, 1 Barn. & C. 654 and *Hill v. Roe*, 6 Taunt. 532; 2 Marsh. 257; *Haggott v. Argent*, 7 Taunt. 47; 2 Marsh. 365; *Buckler v. Rawlins*, 3 Bos. & P. 111; *Perry v. Fisher*, 6 East, 549; *Lovegrove v. Dymond*, 4 Taunt. 669.

² *Keys v. Tavernier*, 1 Chit. 291. See also *Haggett v. Argent*, *supra*; *Rex v. Sheriffs*, 2 Barn. & Ald. 604; 1 Chit. 329.

³ *Margerem v. Mackelwaine*, 2 N. R. 509; *Farley v. Hebbes*, 3 Dowl. O. S. 538.

⁴ *Jerome v. Boeram*, 1 Wend. 293. See *Doe v. Bransom*, 6 Dowl. O. S. 490; *Lovegrove v. Dymond*, 4 Taunt. 669.

⁵ *Twort v. Dayrell*, Ves. 195; *Creswell v. Byron*, 14 Ves. 272; 1 Schoales & L. 315. See *Walmsley v. Booth*, 3 Atk. 27.

⁶ *Mayne v. Watts*, 3 Swanst. 93.

⁷ *Moire v. Mundie*, 1 Stu. 282.

his client to others, an attempt to do so dissolves the relation of solicitor and client, and a communication to that effect from the solicitor to the client is sufficient evidence of the fact to effect such dissolution. In such a case the papers were ordered to be delivered to the client's new solicitor, upon his signing a receipt for them, and agreeing to hold them subject to the lien of the former solicitor.¹ This prohibition against assignments extends also to dissolving partners, one of whom cannot, without the client's consent, turn the business over to the other. They may give notice that they will not longer act for him, and have their fees settled to that time.² An attorney jointly employed by a party has been restrained by injunction from becoming the attorney of the opposite party.³

§ 252. Change of attorney in the United States.—The authority of an attorney under the general retainer does not expire until judgment has been perfected, and sometimes not then. It is a consequence of this that the authority cannot be taken away by a change of attorney, after he has once appeared, unless a notice is given to that effect. This is usually done by a written consent, obtained from the former attorney, that another, who is named in the writing, be substituted in his stead, upon filing which, and giving notice of it, or serving a copy of it, or both, the change is effected. Should this consent be not obtainable, the change must be made by a judge's order, calling upon the attorney (as in the English practice) to show cause why the other should not be appointed for the party instead of the original attorney. This order, it appears in England, need not be served upon the opposite party, but upon the attorney sought to be removed, and it seems there to be a matter of course to make it absolute upon payment of costs.⁴ In New York, it has been said in chancery⁵ that "the right of a party to change his solicitor at pleasure is never disallowed, unless it appears that the change would deprive the solicitor previously appointed of his

¹ *Colegrave v. Manley*, 1 Turn. & R. 401.

² *Cook v. Rhodes*, 19 Ves. 273; 3 Ves. & B. 177.

³ *Cholmondeley v. Clinton*, 19 Ves. 261.

⁴ *Wood v. Plant*, 1 Taunt. 44; *Langley v. Stapleton*, Barnes, 40; *Macpherson v. Rorison*, Doug. 217.

⁵ *Munford v. Murray*, Hopk. 369.

rights, or would in some manner unduly embarrass the course of justice in the cause. Upon these general reasons it is an established practice that a party who desires to change his solicitor must obtain an order of the court for that purpose, and the appointment of a new solicitor, to take the place of one who is acting legitimately, is not effectual until the substitution is allowed by the court. When a solicitor is appointed to take the place of one who is discharged by his client, the practice of the court (of chancery) has uniformly been to obtain an order allowing the substitution." When a rule for the change of an attorney is necessary, as it is designed not only for the benefit of the attorney, but for the sake of the opposite party also, it cannot be dispensed with by any arrangement between the client and his attorney. If he has acted at all as the attorney in the case, though the proceedings have not gone far enough for his name to appear on the record, as where he has merely received the summons and taken out an order for time, or to set aside proceedings as irregular, there must be a rule.¹

The attorney may be changed upon his own consent, but the consent must be filed or an order entered, substituting in his place the new attorney, and notice of the order must be served upon the opposite attorney.² If an attorney is not properly substituted, his acts are to be disregarded, and the opposite party is bound to consider the former attorney as still employed.³

¹ *May v. Pike*, 5 Dowl. O. S. 667; 4 Mees. & W. 197; 2 London Jurist, 597; *Stewart v. Common Pleas*, 10 Wend. 597.

² *Kreckler v. Thaule*, 49 How. Pr. 138; *Anon.* 7 Mad. 50; *Ryland v. Noukes*, 1 Taunt. 342; *Robertson v. McClellan*, 1 How. 90; *Dalon v. Lewis*, 7 How. 132.

³ *Kreckler v. Thaule*, 49 How. Pr. 138; *Jerome v. Bowan*, 1 Wend. 393. Where solicitors had incurred costs for a client, and before any sum had been paid to them on account of such costs, another firm of solicitors entered a second appearance for the same client, on an application made on behalf of the first firm, the court made an order setting aside the second appearance until the costs were paid, and condemned the defendant in the costs of the motion. (*The Oneiza*, 4 L. R. Ad. & E. 36.)

In the United States, the manner of change and substitution is frequently regulated by statute. Thus, in California the attorney in an action or special proceeding may be changed at any time before the judgment or final determination, as follows: Upon his own consent, filed with the clerk, or entered upon the minutes; upon the order of the court or judge thereof; upon the application of the client, after notice to the attorney.

When an attorney is changed, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given the adverse party; until then he must recognize the former attorney.

When an attorney dies, or is removed or suspended, or ceases to act as such,

§ 253. Change of attorney after judgment.—In consequence of the general rule, (subject, however, to qualifications) that the attorney's authority under his general retainer terminates with the entry of judgment, any proceeding subsequent to the judgment, either to enforce, discharge, or vacate it, may be taken by another attorney without any regular substitution. A new attorney may therefore, without any order to change, sue out execution,¹ enter satisfaction on the roll,² or bring an appeal.³ Where a writ of error was brought by the opposite party, it was held that as the authority of the attorney for the successful party in the court below ceases with the judgment, the rule to join in error ought to have been personally served on the defendant, either by delivering it to him, or by leaving it at his dwelling-house, or by some other mode of service which the court might specially direct under the circumstances.⁴ But under most modern statutes and codes of civil procedure a notice of appeal or notice of motion for new trial may usually be served upon the old attorney, if no other has been substituted, and it will be sufficient without service on the party.

§ 254. Effect of the substitution upon the attorney changed.—After an attorney has been changed, there are English cases which hold that the court will not restrain him from acting for the opposite party, unless the change has been procured by his own act, and some confidential communication made to him by the first party who employed him, the disclosure of which might be prejudicial to that party.⁵ But in these cases

a party to an action for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person. (Code Civil Procedure Cal. secs. 284-286. See N. Y. C. C. P. secs. 517-519; 16 Cal. 436; 33 Cal. 208; 6 Cal. 55.)

¹ *Tipping v. Johnson*, 2 Bos. & P. 357; *Thorp v. Fowler*, 5 Cowan, 446. See 4 Lond. Jur. 805.

² *Marr v. Smith*, 4 Barn. & Ald. 466.

³ *Batchelor v. Ellis*, 7 T. R. 337; *Hussey v. Welby*, Sayre, 218; *Beudernagle v. Cocks*, 19 Wend. 151; *Gonnigal v. Smith*, 6 Johns. 106; *Cocks v. Brewer*, 11 Mees. & W. 51; 2 Dowl. N. S. 759; 7 Jur. 218; *Burgess v. Abbott*, 6 Hill, 135; *Dearborn v. Dearborn*, 15 Mass. 316.

⁴ *Clement v. Crossman*, 8 Johns. 287; *Hardenbergh v. Thompson*, 1 Johns. 61.

⁵ *Johnson v. Marriott*, 2 Crompt. & M. 183; 2 Dowl. O. S. 343; *Grissel v. Peto*, 9 Bing. 1; *Cholmondeley v. Clinton*, 19 Ves. 261; *Coop. Ca.* 80; *Bricheno v. Thorp*, Jac. 300; *Beer v. Ward*, Jac. 77.

the attorney did not withdraw from the particular suit and accept a retainer from the other side; but where, in the course of other business or in other suits, he had obtained a knowledge of matters connected with the suit in question. These cases do not apply to the particular suit, and as to it, the rule also has been laid down that, lest any temptation should exist to violate professional confidence, or to make any improper use of the information which an attorney has acquired confidentially, as well as upon principles of public policy, he will not be permitted to be concerned on one side of proceedings in which he was originally in a different interest, even though his former client makes no objection, and though long discharged and feeling that he has forgotten the nature and purport of the communications he had received from the former client.¹

§ 255. Withdrawal of attorney.—Another mode of terminating the relation is by the withdrawal of the attorney; but when he is of record he can only withdraw from a case by leave of the court, and in any event he must on withdrawal notify the opposing counsel. If he does not, service on him is good, and he is responsible to his client if he pays no attention to it.²

An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination,³ and is not at liberty to abandon it without reasonable cause and reasonable notice.⁴ If he abandons it without, he may be liable for the consequences, even though proper funds were not provided for the conduct of the suit;⁵ but the attorney may give such notice on any reasonable cause, as the want of funds; a dissolution of partnership, or his retirement from business, or the insolvency of his client, and may then retire and recover his costs for what he has done.⁶

¹ Lessee of Flynn v. Marshall, 1 Irish Law R. O. S. 59; Hutchins v. Hutchins, 1 Hogan, 315; Keon v. Nesbit, 1 Sausse & S. 365; Waller v. Fowler, Ibid. 369.

² U. S. v. Curry, 6 How. 100. See Martinics v. Johnson, 21 N. J. L.; 1 Zab. 239; Boyd v. Stone, 5 Wis. 240; Bach v. Ballard, 19 La. An. 487.

³ Harris v. Osbourne, 2 Car. & M. 629; Rothery v. Munnings, 1 Barn. & Adol. 17; Whitehead v. Lord, 7 Ex. 691; 21 Law J. Ex. 239.

⁴ Nicholls v. Wilson, 11 Mees. & W. 106; 12 L. T. N. S. 266.

⁵ Mordecai v. Solomon, Sayers, 173; Menzies v. Rodrigues, 1 Price, 92.

⁶ Rowson v. Erle, 1 Moody & M. 538; Vansandan v. Brown, 9 Bing. 402; 2 Moore & S. 543; Wadsworth v. Marshall, 2 Crompt. & J. 665; Hoby v. Built, 3 Barn. & Adol. 350; 2 Johns. 296.

§ 256. Death of attorney or client.—The relation is also totally dissolved by the death of the client,¹ and by the death or absolute and permanent incapacity of the attorney, as in the case of insanity and disbaring.² Upon the death of the attorney in a cause, notice must be given to the opposite party of the appointment of a new attorney before the latter can proceed.³

In ordinary cases, an attorney has a right to consider his employment as continuing to the end of the litigation, unless dismissed by his client.⁴ Where a party litigant dies after verdict, the authority of his attorney to act for him is thereby determined, and he can neither give nor receive notices.⁵ The personal representatives must be brought in and the authority renewed, and due notice thereof given. So the authority of an attorney to receive from the sheriff money collected on an execution in favor of his client, is revoked by the death of his client. The sheriff may retain such money till demanded by the personal representatives of the deceased, and an order of the court that the sheriff pay over the money to the deceased party or his attorney should be enjoined on the application of the sheriff.⁶

The death of the party revokes the appointment of the attorney. The attorney of the ancestor does not become the attorney of the heirs without a new appointment,⁷ and service, where

¹ *Gleason v. Dodd*, 4 Met. Mass. 333; *Putnam v. Van Buren*, 7 How. Pr. 31; *Beach v. Gregory*, 2 Abb. Pr. 206; *Balbi v. Duret*, 3 Edw. 418; *Risley v. Fellows*, 10 Ill. 531; *Judson v. Love*, 35 Cal. 463; *Whitehead v. Lord*, 7 Ex. 691.

² *Wharton on Agency*, secs. 108, 634; *Lovegood v. Dymond*, 1 Taunt. 669; *Cholmondeley v. Clinton*, 19 Ves. 272; *Johnson v. Marriott*, 2 Crompt. & M. 183; *Carver v. United States*, 7 Ct. of Cl. 499; *In re Paschal*, 10 Wall. 483; *Wells v. Hatch*, 43 N. H. 246; *Hazlett v. Gill*, 5 Robt. 611; *Wolf v. Trochelman*, 5 Ibid. 611; *Faust v. Repoor*, 15 How. 570; *Hunt's Est.* 1 Tuck. 55; *Gibbons v. Gibbons*, 4 Har. (Del.) 105; *Glanville*, lib. XI, 613; *Walcott v. Vouchee*, 3 Bing. 423; *Davies v. Lowndes*, 3 Com. B. 808.

³ *Ryland v. Noakes*, 1 Taunt. 342. See *Ashley v. Brown*, 1 Lown. M. & P. 451; 15 Jur. 399; 19 Law J. Q. B. 477; *Lord v. Wardle*, 3 Com. B. 295; 15 Law J. C. P. 259.

⁴ *Langdon v. Castledore*, 30 Vt. 286.

⁵ *Judson v. Love*, 35 Cal. 463; *Warren v. Eddy*, 13 Abb. Pr. 30; *Sanchez v. Roach*, 5 Cal. 248.

⁶ *Risley v. Fellows*, 10 Ill. 531. A solicitor for a client who had been residing abroad filed a bill, but the client was then dead: as soon as the solicitor was advised of the fact, he notified the defendant's solicitor, but the latter continued proceedings on his part. But the court stayed them on motion, and gave him costs only to the day he had notice of the death. (*Balbi v. Duret*, 3 Edw. Ch. 418.)

⁷ *Putnam v. Van Buren*, 7 How. Pr. 31; *Gleason v. Dadd*, 4 Met. 333; *Judson v. Eove*, 35 Cal. 463; *Risley v. Fellows*, 10 Ill. 531; *Campbell v. Kincaid*, 3 T. B. Monroe, 566; *Beach v. Gregory*, 2 Abb. Pr. 206.

the attorney of record is dead, is not sufficient when made on the personal representative, nor on another member of the bar who had been a partner of the deceased counsel. The courts cannot notice law partnerships, or other private arrangements, and counsel cannot be known as such unless by their appearance upon the record.¹

¹ Bacon v. Hart, 1 Black, 38.

Statutory provisions.—In many of the States of the American Union, the statute undertakes to provide what acts the attorney has authority to perform, how he may bind his client, and how far his authority extends. It is not apprehended that the enumeration of these powers is an exclusion of other general powers not provided for by the statute, but which he would have in the absence of legislative regulation, and perhaps in most cases the same powers would exist were the statute entirely silent. In some states, however, it is provided that he shall have the enumerated powers and none others. Very few of these statutes are either complete or satisfactory, and probably neither the attorney nor the client would be injured, were they totally repealed.

CHAPTER XI.

DUTIES OF ATTORNEYS TOWARDS CLIENTS—DEALINGS WITH THEM.

I. DUTIES TOWARDS CLIENT.

- § 257. How the attorney is to fulfill his trust.
- § 258. Degree of fairness and good faith required.
- § 259. Legal duties towards client.
- § 260. Duty of disclosing adverse retainer.
- § 261. Duties in preparing for trial.
- § 262. Duty as to notifying client as to rendering accounts.
- § 263. Duties in collecting money.
- § 264. Payment of money.
- § 265. Duties as to sales of real property—employment by both parties.
- § 266. What the attorney undertakes to do in making a purchase.
- § 267. Duties as to investigating titles.

II. DEALINGS WITH CLIENT.

- § 268. Dealings with client.
- § 269. Transactions upheld.
- § 270. Transactions not upheld.
- § 271. Conflicting interests.
- § 272. Mixing funds.
- § 273. Purchase of client's property.
- § 274. Instances.
- § 275. Exceptions to the rule.
- § 276. Extortionate agreements.
- § 277. Purchase of subject-matter of controversy.
- § 278. Purchase of claims.
- § 279. Information received from client.
- § 280. Investment of moneys.
- § 281. Gifts from client.
- § 282. Rendering accounts.

§ 257. How the attorney is to fulfill his trust.—It is proposed to consider next the duties of the attorney towards his client, and those legal rules which govern the attorney in his dealings with his client and in and about his client's business ; in other words, how he shall fulfill the trust which is confided to him by the Act of Retainer, and how exercise the power and authority with which he is clothed. Obviously, in other chapters, and under other heads, this matter has necessarily been

more or less discussed; but in this chapter we shall confine our attention after a statement of general rules to such topics, for instance, as the degree of fairness and good faith required from the attorney in his dealings with his client; the rule in cases of conflicting interests; the effect of mixing the client's funds with his own; the suspicion with which the law views all purchases from the client by the attorney and all gifts from the one to the other, as well as all agreements in the slightest degree extortionate; the attorney's duty as to preparing for trial; his duties in making sales of real property, and in investigating titles, etc.

Having ascertained what the law presumes that the attorney has undertaken to do, what his duties are, it will be easier to inquire (as will be done in the succeeding chapter) what his liabilities are for a non-performance or a negligent or unskillful performance of those duties.¹

§ 258. Degree of fairness and good faith required.—The highest degree of fairness and of good faith is required from an attorney, and the courts will closely and jealously scrutinize the dealings between attorneys and their clients, and will relieve the latter from any undue consequences resulting from them, whenever the good faith of the contract does not clearly appear.²

An attorney, therefore, when acting for his client, is bound to the most scrupulous good faith. Thus, where the attorney pur-

¹ *Duties of attorneys—Statutory regulations.*—The duties of attorneys are occasionally prescribed by statute. Thus in Alabama it is made the duty of attorneys to support the constitution and laws of the State and the United States. To maintain the respect due to courts of justice and judicial officers. To employ, for the purpose of maintaining the claims confided to them, such means only as are consistent with truth; and never to seek to mislead the judges by any artifice or false statement of the law. To maintain inviolate the confidence, and at every peril to themselves, to preserve the secrets of their clients. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or a witness, unless required by the justice of the cause with which they are charged. To encourage neither the commencement nor continuance of an action or proceeding from any motive of passion or interest. Never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed.

² *Gray v. Emmons*, 7 Mich. 533; *Jennings v. McConnell*, 17 Ill. 148; *Starr v. Vanderheyden*, 9 Johns. 253; *Bibb v. Smith*, 1 Dana, 582; *Mills v. Mills*, 26 Conn. 213; *Monro v. Buffington*, 26 Miss. 184; *Rice v. Commonwealth*, 18 B. Mon. 472; *Brown v. Brown*, 4 Ind. 627; *Zug v. Laughlin*, 23 Ind. 170; *Juday v. Trustees*, *Ibid.* 272; *Bougher v. Schohay*, *Ibid.* 583; *Kane v. Haywood*, 66 N. C. 1.

chases the subject of a suit, the client may set the purchase aside at will, unless the attorney show, by clear and conclusive proof, that no advantage was taken, that everything was explained to the client, and that the price was fair and reasonable. Especially where an attorney has once acted as such in the prosecution of a suit, and had opportunities of knowing the facts of his client's case, is he prohibited from going over and rendering assistance to the adverse side, and then enforcing in a court of equity a contract based on such assistance.¹ An attorney employed or consulted as such, to draw a deed or an application for an original title to land, is precluded from buying in for his own use any outstanding title. In such case the relation is confidential, and whether he acts upon information derived from the client, or from any other source, he is affected with a trust. The rule is on the ground of public policy, not of fraud, and prevails, although the attorney be innocent of any intentions to deceive, and act in good faith. When the attorney buys a title, outstanding or adverse, to land as to which he has been consulted or employed, he buys for his client, if the client so elect. The *cestui que trust* must, however, if he asks equity to assist him, do equity by reimbursing the outlay and costs of the trustee, unless, perhaps, in a case of manifest fraud intended and attempted to be perpetrated.²

When the relation of attorney and client continues, the court will carefully guard the client's rights against every attempt by the attorney to secure any advantage to himself at the expense of the client. Nor is it necessary in such a case for the client to show actual, or, as it is sometimes called, active, fraud in order to obtain relief; but the law will presume in his favor so soon as the confidential relation is known to have existed at the time of the transaction complained of. An attorney, it will be seen, who purchases the subject-matter of the litigation from his client's adversary in the suit, will be deemed to have purchased *in trust* for his client, at his election. And the disability of an attorney to purchase a demand against his client, as to which he has been retained and consulted, and to hold it for his

¹ *Valentine v. Stewart*, 15 Cal. 387.

² *Smith v. Brotherline*, 62 Pa. 461; *Galbraith v. Elder*, 8 Watts, 94; *Cleavinger v. Reimar*, 3 Watts & S. 486; *Henry v. Raiman*, 1 Casey, 354.

own benefit, will continue after the confidential relation has ceased. In such case the attorney is entitled to hold and enforce the demand only for the sum advanced on its purchase. These consequences result from an application of principles of preventive injury, which often attach to innocent transactions with the same legal effect as if the transactions were, in fact, unjust and fraudulent.¹

§ 259. The legal duties of attorneys toward their clients are care, skill, diligence, and integrity. If the attorney has used these, he is not responsible for errors or mistakes incident to the exercise of his vocation. He must use as much diligence in and about his client's business as a prudent man would with his own. He must not be guilty of fraud or deception to the injury of his client, nor put his client to unnecessary expense; he must expedite suits when to the client's advantage to do so, and prevent unnecessary delay, with the same object in view.²

An attorney is bound to avoid gross misconduct and blunders, and also to conduct himself with integrity and professional decorum. He is justified in refusing to follow his client's instructions to do what is merely designed for delay. He should not attempt to influence the opposite party in the absence of his own professional adviser. This proposition it would scarcely be necessary to state if cases had not occurred. Admissions obtained in this way will be rejected or rendered nugatory by the court. The same rule holds good as to any of the opposite witnesses, and to the suppression of evidence by fraudulent means.³

¹ *Brotherson v. Consalus*, 26 How. Pr. 213.

² *Pitt v. Yalden*, 4 Burr. 2060.

Summary jurisdiction.—To compel the exercise of these duties, and to punish the failure to perform them, we have already seen that courts have always exercised a summary jurisdiction over attorneys as officers of the court. In cases of gross negligence, ignorance, or misbehaviour in the conduct of the client's cause, resulting in the client's loss, in cases of non-compliance with well known rules and the practice of the court, in cases where unnecessary expense has been made the client by frivolous applications not for the benefit of the client, the courts have ordered the attorney to pay the costs occasioned by the misconduct. These orders will be enforced by attachment. In cases of malpractice, the punishment may be fines and imprisonment, or the name of the offending attorney may, at discretion, be struck from the rolls. See *ante*, Chapter IV.

³ *Johnston v. Alston*, 1 Camp. 176; *Jones v. Earl of Bath*, 4 Mod. 367; *Vincent v. Groom*, 1 Chit. 182; *In re Oliver*, 4 Nev. & M. 471; 1 Har. & W. 79; *Bishop v.*

§ 260. Duty of disclosing adverse retainer.—An attorney should disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest which may betray his judgment or endanger his fidelity. If a prior retainer is made known to the party, the latter may not entrust the attorney with his business. Still, such concealment may not be in itself, and unaccompanied with other circumstances, conclusive evidence of actual fraud, although a clear misapprehension of professional duty.¹

§ 261. Duties in preparing for trial.—The attorney should, either before the commencement of the suit, or immediately afterwards, obtain all practical information as to the law and evidence of the case by a careful perusal and examination of the papers and documents in the cause,² and by personal communication with the client,³ and examination of the witnesses and proofs.⁴ He should, in due time, make the necessary prepara-

Willis, 5 Beav. 83; Ottley v. Gilby, 8 Beav. 602; Ezart v. Lister, 5 Beav. 585; 12 Law J. Ch. N. S. 10.

A practice in vogue in some localities, but it is to be hoped by no means an extended one, is that of counsel in a cause discussing privately, with the judge who has tried it or is to try it, the questions involved. All argument in a case should be in court, or wherever the matter is heard; and *ex parte* argument outside is as unfair to the opposite party as it is contemptible. The attorney who attempts this should be considered as in contempt, and the judge who allows it is a promising subject for a legislative impeachment. I am happy in this view to be fortified by the authority of Lord Chancellor Cottenham of England, who had occasion to comment on this practice as follows: "*Every private communication to a judge for the purpose of influencing his decision upon a matter publicly before him, always is and always ought to be reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought more frequently than it is to be treated as what it really is, a high contempt of court. It is too often excused on account of the station in life of the parties,*" etc. (In re Dyce Sombre, 1 Macn. & G. 122.)

¹ Williams v. Reed, 3 Mason, 404, per Story J.

² Thwaites v. Mackerson, 3 Car. & P. 341; M. & M. 199.

³ Hopkinson v. Smith, 7 Moore, 237; 1 Bing. 13.

⁴ Harvey v. Mount, 8 Beav. 439.

tions for the trial or hearing, by procuring the production of the requisite documents and the necessary witnesses.¹

§ 262. Duties as to notifying client and rendering accounts.—The attorney should notify the client of any circumstances requiring action on his part. Whatever is important for the client to know, it is the duty of the attorney to communicate if he can. A failure to do so reduces his claim to compensation, and may be a ground for an action against him by his client.²

The liability to render correct accounts is one generally arising from the character of an agent, but in the case of attorneys it is even more imperative. This liability may be at any time enforced against an attorney, and a court of equity may open accounts though many years have elapsed, and the vouchers have been given up.³

§ 263. Collecting money—Statute of limitations.—It is the duty of an attorney who collects money to immediately give his client notice thereof, and await instructions. Unless such circumstances exist as amount to a waiver of demand, no action will lie against an attorney for money collected until a demand is made, or without the existence of such facts as amount to a waiver of the demand;⁴ but in the absence of proof the law will presume notice and demand made in a reasonable time after the money is collected, and at that time the action will be deemed to have accrued. When the attorney by false representations conceals from his client the fact that he has collected the client's money, the cause of action does not accrue until the discovery of the fact. When the wrong of the defendant causes

¹ *De Rouffigny v. Peale*, 3 Taunt. 484; *Reece v. Rigby*, 4 Barn. & Ald. 202

² *Hoopes v. Burnett*, 26 Miss. 428; *Jett v. Hempstead*, 25 Ark. 462; *Fox v. Cooper*, 2 Q. B. 237.

³ *In re Lee*, Law Rep. 4 Ch. 43; *Lewis v. Morgan*, 3 Anstr. 769; 4 Dowl. 29; 5 Price, 42; 3 Younge & J. 230. See *Brown v. Pring*, 1 Ves. Sr. 407; *Newman v. Payne*, 2 Ves. Jr. 199; *Rosse v. Sterling*, 4 Dowl. 442; *Drapers Co. v. Davis*, 2 Atk. 295; *Abbey v. Petch*, 1 Younge & C. Ch. 258.

An attorney intrusted with the collection of debts and receiving notes on third persons for collection, as collateral security for such debts, thereby becomes a trustee for both debtor and creditor, and a court of equity may compel him to account. (*Scott's Admrs. v. Wickliffe*, 1 B. Mon. 353.)

⁴ *Voss v. Bachop*, 5 Kans. 67; *Taylor v. Bates*, 5 Cowen, 376; 6 Cowen, 596; *Lillie v. Hoyt*, 5 Hill, 399; 4 Greenl. 532; 2 Pike, 402; 4 Ala. 494; 3 Barb. 584.

the delay, and not the laches of the plaintiff, he cannot take advantage of his own wrong and plead the statute of limitations.¹

In *McDowell v. Potter*, (8 Barr. 189) it was held that the statute of limitations against a claim on an attorney for money collected began to run from the time the client had knowledge or the means of knowledge that the money had been collected, and that the burden of proving such knowledge was on the attorney, who stands in a fiduciary character, and before he can be permitted to avail himself of this defense he must prove that he has performed his duty; and that duty is to give his client notice of the fact that he has collected the money.² The attorney, therefore, cannot be protected by the statute until demand.

But in another case,³ a suit against an attorney for neglect of duty, six months' failure to commence a suit against a debtor in failing circumstances seems to have been held an unreasonable time; and where the duty is immediate, as in the collection of money, the right of action accrues, and the statute begins to run from the time of the attorney's receipt of the money, even though he gives no notice of its collection, the law deeming it gross negligence on the part of a creditor to neglect to make inquiry for six years, unless the attorney has been guilty of concealment or of some act to put his client off his guard. Such is the modern doctrine qualifying some previous cases.⁴

There is no difference between the nature and extent of liability of an attorney and that of any other agent, in respect to moneys collected by him for his principal and claimed by a third person. So, where an attorney, after notice from plaintiff that she claimed moneys collected by him in an action, paid it over to his client, it was held that plaintiff was entitled to recover of the attorney the amount so paid over. The attorney might protect himself by demanding security of the claimant or client, and pay to either upon receiving indemnity.⁵

Where an attorney procures money to be advanced by a third

¹ *Voss v. Bachop*, *supra*; *Cutting v. Way*, 20 N. H. 120.

² *Voss v. Bachop*, 5 Kan. 67. See *Stafford v. Richardson*, 15 Wend. 305.

³ *Livingston v. Cox*, 66 Pa. 360.

⁴ *Rhines v. Evans*, 66 Pa. 195. See *McDowell v. Potter*, 8 Barr. 189; *Campbell's Admr. v. Boggs*, 12 Wright, 524; *Downey v. Garard*, 12 Harris, 52.

⁵ *Sims v. Brown*, 6 Thomp. & C. 5; *Langley v. Warner*, 1 Sand. 209; *In re Bleakley*, 5 Paige, 311; *Marvin v. Elwood*, 11 Paige, 365.

person in the prosecution of an action, without attempting to pledge the credit of his client therefor, the attorney alone is responsible to the third party.¹ In a suit against an attorney for funds collected on a note, the property of an estate payable to the administrator or bearer, the attorney cannot plead that such note had been assigned to him by the administrator in payment of a debt owed by the administrator to the attorney.²

§ 264. Payment of money.—The attorney must faithfully pay over to his client money received on his behalf. One usual mode of enforcing this duty is by summary application to the court. He may also be proceeded against by action for money had and received; but according to some cases not until after demand or direction to remit,³ even although he may have declared he intended to retain the money, unless such declaration be made to the agent of the plaintiff or come to his knowledge.⁴

§ 265. Sales of real estate—employment by both parties.—It occasionally happens that an attorney who has effected an arrangement for a sale of property, and is known to both parties, becomes employed by both in the transaction; employed by both and with the knowledge of both, *prima facie*, no great degree of turpitude attaches to his thus acting. But the practice is objectionable, and may lead to serious complications and embarrassments. Sugden, in his *Vendors and Purchasers*, thus criticizes such action:⁵ “This practice has been discountenanced by the courts,⁶ and is often productive of the most serious consequences; for it not rarely happens that there are incumbrances on an estate which can be sustained in equity only, and which will not bind a purchaser who obtains the legal estate, unless he had notice of them previously to completing his purchase. Now, notice to an agent, although one concerned for both parties, is treated in equity as notice to the purchaser himself,⁷ and therefore, if the attorney know of any equitable in-

¹ *Bell v. Mason*, 10 Vt. 509.

² *Bledsoe v. White*, 42 Tex. 130.

³ *Taylor v. Bates*, 5 Cowen, 376; *Lillie v. Hoyt*, 5 Hill, 395.

⁴ *Rathbun v. Ingalls*, 7 Wend. 320.

⁵ *Vendor and Purchaser*, p. 7, ed. 11.

⁶ 6 Ves. 631*n*.

⁷ *Franklin v. Cothouse*, 3 Swanst. 301.

cumbrance, the purchaser will be bound by it, although he himself was not aware of its existence. And by these means a purchaser may even deprive himself of the benefit to be derived from the estate lying in a register county; the register may be searched and no incumbrance appear; yet if the attorney have notice of any unregistered incumbrance, equity will assist the incumbrancer in establishing his demand against the purchaser. Another powerful reason why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate to which the attorney is privy, the purchaser, although it be proved that he was innocent, will be responsible for the misconduct of his agent.¹ In one case,² a purchaser lost an estate for which he gave nearly £8,000, merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase-money."

So the attorney may be liable to the purchaser for negligence or deceit, if the purchase is completed;³ and in the next place, he may be liable to the vendor if the purchase fall through by reason of his disclosing to the proposed vendee defects which he has discovered as attorney for the vendor.⁴ In a case where a solicitor acted for both parties in the matter of a voluntary settlement, which was set aside for undue influence, in a suit in which the solicitor was made defendant, the court, though exonerating him from culpability in the matter, made him bear his own costs, because he had not acted with proper prudence.⁵ There is the further objection arising from the privilege of professional communications, either in the application of the rule, or where they are not privileged.⁶

§ 266. What the attorney undertakes in making purchases.—An attorney in a purchase or a mortgage transaction undertakes to investigate only the legal requisites of a title, and

¹ Bowles v. Stewart, 1 Schoales & L. 227.

² Doe v. Martin, 4 T. R. 39; Hicks v. Morant, 3 Younge & J. 286; 2 Dow & C. 414. See Taylor v. Blacklow, 3 Bing. N. C. 235.

³ 1 Ves. 96; 6 Ibid. 193; Burroughs v. Lock, 10 Ves. 470; Bowles v. Stewart, 1 Schoales & L. 227.

⁴ Taylor v. Blacklow, 3 Bing. N. C. 235.

⁵ Harvey v. Mount, 8 Beav. 439.

⁶ Perry v. Smith, 9 Mees. & W. 681; Shore v. Bedford, 12 Law J. Com. P. 133.

not its value.¹ He is to see that the security is sufficient in point of law.² But where the attorney is employed to invest the money and find the proper security in point of value, a different rule prevails.³ Where a transaction in which an attorney is engaged creates a case of combined agency and trust, he may be liable for loss like an ordinary trustee.⁴

A statute providing that no trust shall result in favor of the party furnishing the consideration for a purchase in the name of another, does not apply to a conveyance obtained by fraud. And so, where an attorney is employed to purchase tax-titles and other outstanding claims against his client's lands, to strengthen the title, which is defective of record, the client furnishing the means, and such purchases are made at the suggestion of the attorney in his own name, a conveyance to a third person, by the attorney, in violation of the professional confidence reposed in him, will not be protected by such a statute. A consent that the conveyances should be taken in the attorney's name having been obtained by him, by means of the confidence reposed in him as an attorney, for the fraudulent purpose of appropriation, is void.⁵

§ 267. Duties of attorneys in investigating titles.—The first duty of the purchaser's attorney on receiving the abstract of title is to read carefully through it, in order to see whether, on the face of it, a proper title appears to be disclosed, and if

¹ *Green v. Dixon*, 1 Jur. 137.

² *Howell v. Young*, 5 Barn. & C. 259; *Hayne v. Rhodes*, 8 Q. B. 342.

³ *Dartnell v. Howard*, 4 Barn. & C. 345.

⁴ *Craig v. Watson*, 8 Beav. 427.

It is the duty of an attorney engaged in the settlement of an intricate transaction which his client is called on to release or confirm, to inform himself of the history of the transaction and the nature of the accounts. (*De Montmorency v. Devereux*, 8 Clark & F. 228.)

Where an attorney of an injured and aged trustee advised him to commit a breach of trust and transfer the trust fund to himself, he was ordered to show cause why he should not be stricken off the rolls. (*Goodwin v. Gosnell*, 2 Coll. 457.)

It seems almost unnecessary to suggest that the attorney for either party in a purchase or negotiation should cautiously abstain from seeking to influence the client of the other behind his counsel's back. As, however, such a case once occurred, it may be proper to state that such a course will possibly lead to the contract's being rescinded by the court. (*Bent v. Armistead*, 2 Keep, 221.)

⁵ *Linsley v. Sinclair*, 24 Mich. 380.

the abstract is properly framed, which a competent person can soon ascertain. It is then his duty to carefully examine every deed or instrument constituting or affecting the title. The abstract should be compared with the original deeds if accessible; and the purchaser's solicitor should, it has been held in England, search for any incumbrances upon the property, such as judgments, etc., as he has been held liable to his client for any omission on this point.¹ And it has been held that if the purchase falls through for defects of title, his client will be entitled to recover from the vendor the costs of the searches.²

§ 268. Dealings between attorney and client.—Dealings between attorney and client are carefully and jealously regarded, particularly by courts of equity, to protect the client even from his own acts, if done under the influence or supposed ascendancy which the attorney may have over him.³ A court has refused to hear it argued that an attorney could take a mortgage from his client to secure costs to be incurred.⁴ Transactions ordinarily not open to the slightest objection have been declared invalid as against a client. Whatever hardship may arise in particular cases, the law to prevent public mischief, and to protect the client, declares that attorneys shall take no benefit under such circumstances. Not until the relation has completely ceased is the influence supposed to have completely ceased. Not until then is the attorney safe in dealings outside of his professional duty. Not until then can the client even exhibit his generosity with safety to his counsel⁵ in the way of gifts or extra emoluments. This jealous care and scrutiny over such transactions extends to all gifts, conveyances, and contracts by the client, and all securities given by him pending the relation.⁶

¹ See *Brooks v. Day*, 2 Dick. 572; *Foreshall v. Coles*, Peake Ad. Cas. 286; *Green v. Jackson*, *Ibid.*; *Hart v. Frame*, 6 Clark & F. 209.

² *Hodges v. Litchfield*, 1 Bing. N. C. 499.

³ *Newman v. Payne*, 2 Ves. 201; 1 Ball & B. 17.

⁴ *Jones v. Tripp*, 1 Jacob, 322; *Pitcher v. Rigby*, 9 Price, 83.

⁵ *Wells v. Middleton*, Cox, 112; 4 Prown Parl. C. 26, 245; *Wright v. Proud*, 13 Ves. 138; *Wood v. Downs*, 18 Ves. 127; *Oldham v. Hand*, 2 Ves. 259; *Bellew v. Russell*, 1 Ball & B. 104; 1 Madd. 314.

⁶ *Gray v. Emmons*, 7 Mich. 533. An attorney must show that the client acted freely and understandingly. If it be claimed that an instrument executed by the client, during the professional relation, was intended to provide a remuneration

When the relation of attorney and client exists, and a security is taken by the former from his client, the presumption is that the transaction is unfair, and the onus of proving its fairness is upon the solicitor.¹ An agreement made by a client with his attorney after the latter has been employed in a particular business, by which the original contract is varied, and greater compensation is secured to the counsel than may have been agreed upon when first retained, is invalid, and cannot be enforced.²

ation for past services, then the plaintiff must prove such services, that there existed at the time of giving it at least a moral obligation to pay, that the instrument was fully understood by the person executing it, and was made in pursuance of, and in accordance with, a well-considered, definite, and settled purpose. (*Jennings v. McConnell*, 17 Ill. 148; *Brock v. Barnes*, 40 Barb. 521; *Howell v. Ransom*, 11 Paige, 538.) The foundation of the rule is the influence arising from the relation: so long, therefore, as the influence exists, the rule of course applies. "It is apparent that in many cases the influence acquired during the existence of the relation may extend more or less after the period of its termination. The authorities show that when this is the case the transaction will be scrutinized with the same jealousy as if the relation had continued. In the language of Lord Eldon in *Woods v. Downes*, 13 Ves. 119, 'it is not denied in any case that if the relation had completely ceased—if the influence can be supposed also rationally to cease—a client may be generous to his attorney or counsel as to any other person, but it must go so far.'"

So where a conveyance of land has been executed from the client to the attorney under the influence of confidential relations, even after the relation of attorney and client had ceased, the position of the case is precisely the same as if the deed had been given before the litigation was ended. "It was not executed as a gift, but as a compensation for professional and other services previously rendered. In such cases the courts will not set aside a transaction if it appears clearly to have been in all respects just and fair, or if the action of the client seems to have been entirely voluntary, *i. e.*, without any disturbing influence growing out of the relation. But such an influence is uniformly suspected. It is not necessary for the client to establish it by proof *aliunde*: the presumption is in his favor. The law presumes such influence from the relation between the parties. This presumption would no doubt be repelled in a case where the court could see from the character and conduct of the parties that there was no reason to impute to the attorney any undue ascendancy over the mind of his client."

A deed or instrument given in such case as a compensation for services rendered will be allowed to stand as security for what is actually due. (*Mason v. Ring*, 2 Abb. P. N. S. 322.)

¹ *Evans v. Ellis*, 5 Denio, 640; *Newman v. Payne*, 2 Ves. 199; *Walmesley v. Booth*, 3 Atk. 25; *Montesquieu v. Sandys*, 18 Ves. 313; *Stockton v. Ford*, 11 How. 247; *Starr v. Vanderheyden*, 9 Johns. 253; *Howell v. Ransom*, 11 Paige, 538; *D'Rose v. Fay*, 4 Edw. Ch. 40; *Lewis v. J. A.*, *Ibid.*; *Berrien v. McLane*, 1 Hoff. Ch. 424; *Miles v. Irvin*, 1 McCord Ch. 524; *Rose v. Mynell*, 7 Yerg. 30; *Bibb v. Smith*, 1 Dana, 482; *Smith v. Thompson's Heirs*, 7 B. Mon. 308; *Jennings v. McConnell*, 17 Ill. 148; *Mills v. Mills*, 26 Conn. 213; *Kisling v. Shaw*, 33 Cal. 425; *Nesbitt v. Lockman*, 34 N. Y. 167.

² *Lecatt v. Salle*, 3 Port. 115.

An attorney in all transactions with his client is regarded as acting in a fiduciary capacity.¹

The rule applicable to transactions between an attorney and client, such as contracts, sales, gifts, etc., is, that the attorney who bargains in a matter of advantage to himself with his client is bound to show that the transaction is fair and equitable; that he fully and faithfully discharged his duties to his client, without misrepresentation or concealment of any fact material to the client; that the client was fully informed of his rights and interests in the subject-matter of the transaction, and the nature and effect of the contract, sale, or gift, and was so placed as to be able to deal with his attorney at arm's length.²

§ 269. Transactions upheld.—A contract entered into between a client and an attorney in which the attorney undertakes to resist a motion for a new trial, and to receive for his services a portion of the land, is binding on the client, if no concealment or improper practices were to be used, or were in fact used by the attorney, in performing the contract on his part; and a court of equity will not refuse to enforce specific performance of such a contract on the ground of want of mutuality.³

If an attorney at law is consulted as to the legal effect of a power of attorney given to the one who seeks his advice, and is directed as a conveyancer to prepare a deed of land to be executed by the one who gave the power to the attorney in fact, and the attorney at law performs the duty devolving on him by the employment, and in so doing derives no information from his employer relative to the land, and the parties refuse to execute the deed, these facts do not make the lawyer the trustee of his employer if he afterward buys the land.⁴

Where an attorney recovers judgment in his own name on a note or claim sent to him for collection, and the amount of which is made out of property of the defendant and paid over to the

¹ *Heffren v. Jayne*, 39 Ind. 463; *McCormick v. Malin*, 5 Blackf. 509.

² *Kisling v. Shaw*, 33 Cal. 425; 1 Story Eq. Jur. sec. 310; *Gibson v. Jeyes*, 6 Ves. 266; *Newman v. Payne*, 2 Ves. 199; *Howell v. Ransom*, 11 Paige, 538; *Evans v. Ellis*, 5 Denio, 640; *Ford v. Harrington*, 16 N. Y. 288; *Whelan v. Whelan*, 3 Cowen, 537; *Cuts v. Salmon*, 12 Eng. L. & Eq. 316; *Greenfield Estate*, 14 Pa. 490; *Wright v. Proud*, 13 Ves. 137; *Hunter v. Atkins*, 3 Mylne & K. 113.

³ *Ballard v. Carr*, 48 Cal. 74.

⁴ *Porter v. Peckham*, 44 Cal. 204.

client, the attorney, upon being subsequently compelled to refund the money so paid to the client to a party having a prior lien on, or right to, the property sold to satisfy the judgment, may recover back from his client the money so collected and paid on the judgment; but in such a case, if the judgment obtained in the name of the attorney has been satisfied of record, the attorney, in order to recover, must make the client whole by showing that the satisfaction of the judgment has been set aside, or that there is, in some form, recourse against the original defendant, within the power and control of the client.¹

A deed by a client to his attorney for the consideration of affection and friendship, and also for a sum of money, though not one third the value of the land conveyed, will not be set aside on the ground of blind confidence on one side, and undue influence on the other, there being no evidence of imbecility or incapacity in the grantor, nor of fraud or imposition by the grantee.²

§ 270. Transactions not upheld.—An attorney who procured a judgment for his client which he knew to be invalid, and afterward suffered and assisted him to purchase the property upon execution sale under such void judgment, is estopped from afterward acquiring title to the same property from the judgment debtor.³

A conveyance intended by both parties to hinder and delay the creditors of the grantor cannot, even as against the grantor, be sustained in favor of the grantee or his assignee with notice, by reason of the fact that the grantee was the attorney and counsel of the grantor, and as such advised and received the conveyance. Attorney and client, when parties to such a transaction, are not regarded *in pari delicto*; but the client will be relieved if it can be done without injury to an innocent purchaser.⁴ An attorney having taken an infant, entitled when of age to property, advanced moneys and taken acknowledgments from him that they were for necessities, and within a month after his coming of age obtained, without the intervention or advice of any other friend on the infant's part, a bill in

¹ Seevers v. Hamilton, 6 Iowa, 199.

² Wendell v. Van Rensselaer, 1 Johns. Ch. 344.

³ Phillips v. Blair, 38 Iowa, 649. But see Learned v. Haley, 34 Cal. 608.

⁴ Goodenough v. Spencer, 15 Abb. Pr. N. S. 248.

blank at which time all the vouchers were given up or destroyed, the relation was put upon the footing of guardian and ward, and it was held he could not conclude the defendant by such an acknowledgment. So a purchase of a bankrupt's estate by the solicitor of a commission was set aside, though he gave the full value for it at a public auction; Lord Eldon declaring that he would set aside all purchases made by persons having a confidential character, "however honest the circumstances."

An attorney advising the devise of property to himself on the pretense that he would only make use of it for another, but intending, nevertheless, to appropriate it for his own use, is guilty of a gross fraud and breach of confidence.¹ A purchase by the attorney of property sold under a judgment obtained by him for a price less than its amount, constitutes the attorney the implied trustee of his client, and the vendee of the attorney may also be fixed with the implied trust.²

Where the relation of client and attorney exists, and the attorney, at the instance of his client, purchases a note which is secured by mortgage on the land of the client at a considerable discount, the latter will be entitled to the benefit of the purchase, although the attorney may have bought it for himself.³ An attorney will not be relieved from the obligations imposed upon him by reason of his confidential relation in dealing with his client, in reference to property involved in that relation, merely from the fact that the negotiation between them is carried on through a third person, the latter being interested at the time with the attorney in the transaction.⁴

§ 271. Conflicting interests.—"An attorney cannot accept interests conflicting with those of his client. Any deviation in this respect may expose him, not only to an action for damages on the part of his client, but to discipline on the part of the court.⁵ An attorney cannot act in a suit in which he is employ-

¹ *Hooker v. Axford*, 33 Mich. 453.

² *Barrett v. Bamber*, 9 Phila. 202.

³ *McDowell v. Milroy*, 69 Ill. 498. See *McDonald v. Moore*, 34 Tex. 384.

⁴ *Zeigler v. Hughes*, 55 Ill. 288.

⁵ *Wharton on Agency*, sec. 593; *Com. v. Gibbs*, 4 Gray, 146; *Price v. Grand Rapids R. R.* 18 Ind. 139; *Gaulden v. State*, 11 Ga. 47; *Wilson v. State*, 16 Ind. 392; *Herrick v. Catley*, 1 Daley, 512; 30 How. Pr. 208; *Sherwood v. R. R.* 15 Barb. 650; *Howell v. Baker*, 4 Johns. Ch. 118; *McArthur v. Fry*, 10 Kan. 231;

ed as commissioner to take testimony;¹ nor as solicitor for the receiver for whose appointment he moves;² nor as master to execute a decree;³ nor as administrator of an estate against which he is pressing a hostile claim.⁴ But by mutual consent an attorney may act as umpire for both parties, in the absence of fraud.”⁵

As a rule, an attorney cannot represent both sides, even though the proceedings be amicable; nor can he, after having been retained by one side, obtain, under such circumstances, compensation for his services from the other.⁶ Still, sometimes in chancery suits the same solicitor may be concerned for several parties, some of whom may be plaintiffs and some defendants. But a solicitor who is concerned for two parties having distinct interests, binds each client by notices which he receives on behalf of the other; and the courts will often deal differently in such cases than they would under ordinary circumstances.⁷

In cases of loans, grants of annuities, family settlements and arrangements, it is sometimes the interest and wish of all parties that one solicitor should act. But when anything remains open in the shape of negotiation, it is more prudent to call in a second solicitor.⁸ Communications made to the solicitor in such cases are, generally speaking, not privileged.⁹

When an attorney has been employed in a cause, and is afterward discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposite party, unless it clearly and distinctly appears that he has obtained information in his former character which would be prejudicial to the cause of his former client to communicate.¹⁰ If an attorney

Johnson v. Marriott, 2 Crompt. & M. 183; 2 D. P. C. 343; *Grissell v. Peto*, 2 Moore & S. 2; 9 Bing. 1; *Masonic Co. v. Nokes*, 22 L. T. N. S. 503; *Mare v. Lewis*, 4 I. R. Eq. 219.

¹ *Taylor v. Bank*, 14 Ala. 633.

² *Warren v. Sprague*, 4 Edw. N. Y. 416.

³ *White v. Haffaker*, 27 Ill. 349.

⁴ *Spinks v. Davis*, 32 Miss. 152.

⁵ *Joslin v. Cowee*, 56 N. Y. 626.

⁶ *Herrick v. Cotley*, 1 Daly, 512; 30 How. Pr. 208; *Sherwood v. Saratoga R. R. Co.* 15 Barb. 650; *Valentine v. Stewart*, 15 Cal. 387. See ante, sec. —.

⁷ *Partington v. Bailie*, 5 Sim. 667.

⁸ *Adamson v. Evitt*, 2 Russ. & M. 66; *Harvey v. Mount*, 8 Beav. 439.

⁹ *Perry v. Smith*, 9 Mees. & W. 631; *Shore v. Bedford*, 12 Law J. Com. P. 138.

¹⁰ *Johnson v. Marriott*, 2 Crompt. & M. 183; 2 D. P. C. 343; 4 Tyr. 78; *Grissell v. Peto*, 2 Moore & S. 2; 9 Bing. 1.

is acting for his client on a particular occasion he may throw off that character, and exercise his independent rights.¹

It is an established rule that the attorney shall not in any way whatever, in respect of any professional transactions between him and his client, make gain or profit for himself at the expense of his client, beyond the amount of his just and fair professional remuneration. He must account to his client for all profits.² He cannot, as a rule, act adversely to his client's interests; nor use the knowledge acquired confidentially in trafficking with his client's interests.³

§ 272. Mixing funds.—Attorneys are liable for any loss a client may sustain by their client's money not being immediately handed over when received. The failure of a bank into which it was paid in the attorney's own name makes the attorney liable; for, however hard this may be on the latter, it is a clear rule of law that if he mix up money belonging to his client with his own, he thereby renders himself the client's debtor.⁴ Sums negligently paid out may be recovered back from the attorney.⁵

§ 273. Purchase of client's property.—As a general rule, the attitude of the attorney toward his client prevents the former from purchasing his client's property, and at all events, without the most ample information being afforded to the client to place him on his guard.⁶ This rule is founded upon the inequality which is supposed to exist between counsel and client, the habitual exercise of power on the one side, and submission on the other, so that even without the exercise of any power beyond that which may be inferred from the nature of the transaction itself, the courts will presume and impute an undue influence.⁷ If the party will insist on mixing the character of

¹ *Austin v. Chambers*, 6 Clark & F. 1.

² *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; 8 Jur. N. S. 849; 31 L. J. Ch. 369; 10 Week. R. 359; 9 L. T. N. S. 1.

³ *Hatch v. Fogarty*, 40 How. Pr. 492; S. C. 10 Abb. Pr. N. S. 147.

⁴ *Robinson v. Ward*, 1 Ryan & M. 274. See *Knight v. Lord Plymouth*, 3 Atk. 480; *Rowth v. Stowell*, 3 Ves. 656; *Adams v. Claxton*, 6 Ves. 226.

⁵ *Harris v. Rees*, 16 Week. R. 91.

⁶ *Howell v. Baker*, 4 Johns. Ch. 117; *Miles v. Ervin*, 1 McCord, Ch. 524; *Rose v. Mynatt*, 7 Yerg. 30; *Leisenring v. Black*, 5 Watts, 303; *Berrien v. M'Lain*, 1 Hoff. Ch. 421; *Hawley v. Cramer*, 4 Cowen, 717; *Carter v. Palmer*, 8 Cl. & F. 657.

⁷ *Carborne v. Barsham*, 2 Beav. 76.

an attorney with that of vendor, he must, if the propriety of the contract comes in question, show that he had given the client all reasonable advice against himself that he would have given him against third parties.¹ In all such transactions the most open and undisguised conduct on the part of the attorney is necessary, or they may be set aside in a suit in equity.² The transaction is viewed with suspicion, and the presumption is against the attorney,³ and the rule is applicable to transactions with an attorney's managing clerk.⁴ So long as the influence exists the rule applies, though the technical relation has ceased.⁵

A purchase by the attorney at law for the plaintiff in a judgment, of property sold under such judgment for a price less than its amount, constitutes the attorney the implied trustee of his client. Such a state of the record is constructive notice to the attorney's vendee, and fixes him also with the implied trust.⁶

The general allegation that the defendant was the plaintiff's counsel, and undertook to conduct a suit for foreclosure of mortgaged premises to a decree and sale thereof for the plaintiff's benefit, but that he bought it in his own name, sufficiently alleges a trust which a court of equity will enforce against the defendant, by requiring him to convey the legal title to the plaintiffs, upon being reimbursed his necessary expenses in procuring it, and on such other terms as the justice of the case requires.⁷

Sales made and conveyances made in pursuance thereof, from clients to the attorneys, will be annulled unless shown to have

¹ *Montesquieu v. Sandys*, cited in 3 Sugden's Vendors, 238; *Edwards v. Myrick*, 12 Law J. Ch. 52; 2 Hare, 60.

² *Abbey v. Petch*, 11 Law J. N. S. Ch. 124; 1 Y. & Coll. 258; *Edwards v. Myrick*, *supra*; *Wood v. Davis*, 18 Ves. 120; *Newman v. Payne*, 2 Ves. Sr. 199; *Lewis v. Hillman*, 3 House of Lords Cas. 607; *Cutts v. Salmon*, 21 L. J. Ch. 750; 4 De Gex & S. 123.

³ *Whitehead v. Kennedy*, 7 Hun. 230; *De Rose v. Fray*, 3 Edw. 369; *Sweeney v. King*, 35 Eng. L. & Eq. 100; *Evans v. Ellis*, 5 Den. 640; *Mason v. Ring*, 3 Abb. Ap. Dec. 210; *Brock v. Barnes*, 40 Barb. 521; *Ford v. Harrington*, 16 N. Y. 285; *Staley v. Dodge*, 50 Ill. 43.

⁴ *Poillon v. Martin*, 1 Sand. Ch. 569.

⁵ *Mason v. Ring*, 3 Abb. N. Y. App. 210.

⁶ *Barrett v. Bamber*, 9 Phila. 202; *In re The Taylor Orphan Asylum*, 36 Wis. 534. See *Trotter v. Smith*, 59 Ill. 240; *Alwood v. Mansfield*, 59 Ill. 496.

⁷ *Case v. Carroll*, 35 N. Y. 385; *West v. Raymond*, 21 Ind. 305; *Lashley v. Caswell*, 23 Ind. 600; *Eshleman v. Lewis*, 49 Pa. 410; *Annan v. Stout*, 42 Pa. 114; *Adams v. Fox*, 40 Barb. 442; *Leach v. Fowler*, 22 Ark. 143; *Zeigler v. Hughes*, 55 Ill. 288; *Warren v. Hawkins*, 49 Mo. 137; *Wheeler v. Williard*, 44 Vt. 640; *Hamsher v. Kline*, 57 Pa. 397.

originated in *uberrima fide*.¹ So where a conveyance was made by a client to his attorneys in part consideration of excessive fees. The burden of proving the rectitude of the transaction is upon the attorney, and upon his failure to make such proof equity treats it as a case of constructive fraud.² Purchases by an attorney from his client pending litigation have been held absolutely void,³ and to sustain any such transaction the most scrupulous good faith must be proved to have been exercised.⁴

It is not necessary to prove actual fraud on the part of the attorney. The latter cannot sustain a purchase from his client without showing that he communicated to such client everything necessary to enable him to form a correct judgment as to the real value of the subject of the purchase, and as to the propriety of selling for the price offered. And the neglect of the attorney to inform himself of the true state of the facts, will not enable him to sustain a purchase from his client for an inadequate consideration.⁵ But fraud will not be imputed in the purchase of real estate by an attorney at a sale under execution in favor of his client, when the latter has announced his inability to pay the costs and taxes, and has instructed his attorney to bid it off in his own name, to reimburse himself for advances.⁶

The same principle which prohibits trustees and public officers from buying property of which they have the management, at a sale thereof made and controlled by themselves, forbids an attorney who manages a suit, and has a right to control to some extent the sale made by the commissioner, to become a purchaser at such sale. Particularly ought a purchase under such circumstances to be regarded as invalid, when it results in a sacrifice of the property which might be prejudicial to the client and beneficial alone to the attorney who purchases; but a contract which has been acted upon by both parties will not be disturbed after

¹ Polson v. Young, 37 Iowa, 196; Harper v. Perry, 28 Iowa, 57; McCormick v. Malone, 5 Blackf. 509.

² Jennings v. McConnell, 17 Ill. 148; Dunn v. Record, 63 Me. 17; Kisling v. Shaw, 33 Cal. 425; Howel v. Ransom, 11 Paige, 539.

³ West v. Raymond, 21 Ind. 305. See Simpson v. Lamb, 40 Eng. L. & Eq. 59; Harper v. Perry, 28 Iowa, 57.

⁴ Judah v. Trustees, 23 Ind. 272.

⁵ Howell v. Ransom, 11 Paige, 538.

⁶ Paige v. Stubbs, 39 Iowa, 537.

a long lapse of time;¹ and a deed given by the client as security for compensation may be allowed to stand as security for what is already done.²

The general principle is that an attorney, upon principles of public policy if for no other reason, is not permitted to purchase the subject-matter of the litigation he is managing for his client. A grant of land by a client to his attorney, pending a suit for the recovery of it, is forbidden at common law.³ In equity also an attorney, *pendente lite*, or whilst doing business for his client, is forbidden to prevail upon him to give security, or to agree to an exorbitant reward. In such cases a court of equity will interfere; for no attorney can take anything for his own benefit, pending the suit, except his demand, nor until the relationship and influence have ceased.⁴ This is the general rule, subject to the qualification that an attorney may *purchase* of his client if he can show conclusively to support his purchase that he paid the *full amount* he could have obtained from any other person;⁵ and the rule and qualification is substantially the same when the sale is by an attorney to his client.⁶ The courts have sometimes decreed that conveyances to an attorney should stand as security for the services already performed, or for money due, and the surplus declared a trust.⁷

The courts do not hold that an attorney is absolutely incapable of purchasing from his client,⁸ but watch such a transaction with jealousy, and throw on the attorney the burden of proving that the bargain is, generally speaking, as good as any that could have been obtained by due diligence from any other purchaser. The circumstances of the employment may be considered, and

¹ *Smith v. Thompson's Heirs*, 7 B. Mon. 310; *Leisenring v. Black*, 5 Watts, 303; *Foreman v. Hunt*, 3 Dana, 614; *Howell's Heirs v. McCreery's Heirs*, 7 Dana, 388; *Busey v. Hardin*, 2 B. Mon. 407. See *Arden v. Patterson*, 5 Johns. Ch. 44; *Reigal v. Wood*, 1 *Ibid.* 401.

² *Mason v. Ring*, 3 Abb. N. Y. App. 210.

³ *Hall v. Hallett*, 1 Cox, 134; 2 Inst. 208.

⁴ *Westminster I*, chap. 25; *Ibid. II*, chap. 29; 28 Edw. I, chap. 11; *Saunderson v. Glass*, 2 Atk. 298; *Wood v. Downes*, 18 Ves. 120; *Wells v. Middleton*, 4 Brown Parl. C. 26; *Bellen v. Russell*, 1 Ball & B. 96.

⁵ *Harris v. Tremenhare*, 2 Schoales & L. 474; 15 Ves. 42.

⁶ *Gibson v. Jeyes*, 6 Ves. 278.

⁷ *Wood v. Downes*, 18 Ves. 120; 2 Schoales & L. 474; *Saunderson v. Glass*, 2 Atk. 296.

⁸ *Roman v. Mali*, 42 Md. 513; *Hess v. Voss*, 52 Ill. 472.

the amount of influence estimated.¹ The attorney cannot, after judgment, deal with reference to the matter to the prejudice of the client.²

§ 274. Instances.—The purchase by an attorney at tax sale of land in regard to which he has been retained, is inconsistent with his relation to his client, and void, notwithstanding there may have been no bad faith on his part.³ No attorney can be permitted to buy in things in a course of litigation of which he has the management, but while an attorney is not permitted to acquire property in the exercise of bad faith toward his client, yet the attempt of the latter to defraud him of reasonable compensation will authorize him to sever the relation and act for his own protection.⁴ Thus, where the client refused for four years to pay the attorney for fees, and reimburse him for expenses incurred in an action to foreclose a mortgage, and the mortgaged land was afterward purchased by the attorney at a tax-sale, the client, being informed of the sale, and failing to pay the amount thus advanced, the court held that the client would not be permitted seven years thereafter to maintain an action to set aside the tax-deed.⁵ The attorney has rights as well as the client; and while he is bound to the exercise of good faith, his client is not relieved therefrom. The client cannot take advantage of the relation existing between him and his attorney to wrong the one whose services he has engaged. An attorney, by the mere act of purchasing stock sold on his client's judgment, does not thereby make himself his client's trustee; for the client may decline the relation. Where an attorney purchases on his client's judgment he is liable to be held a trustee at his client's election.⁶

¹ *Pisani v. Attorney-General*, L. R. 5 Priv. C. C. 516; S. C. 10 Moak Eng. R. 78; *Dunn v. Record*, 63 Me. 17. The presumption is against the attorney, and the onus upon him. (*Brock v. Barnes*, 40 Barb. 521.)

² *Zeigler v. Hughes*, 55 Ill. 288; *Carter v. Palmer*, 1 Dru. & War. 722; S. C. 1 I. R. Eq. 289; *Brotherson v. Consalus*, 25 How. Pr. 213; *Brock v. Barnes*, 40 Barb. 521; *Hatch v. Fogarty*, 10 Abb. Pr. N. S. 147; 40 How. Pr. 492; *Davis v. Smith*; 43 Vt. 269; *White v. Whalley*, 40 How. Pt. 353; *Mason v. Ring*, 2 Abb. N. S. 324; *Nesbitt v. Lockman*, 34 N. Y. 167; *Case v. Carroll*, 35 N. Y. 385.)

³ *Wright v. Walker*, 30 Ark. 44; *Hall v. Hallett*, 1 Cox, 134.

⁴ *Page v. Stubbs*, 39 Iowa, 537.

⁵ *Eckrote v. Myers*, 41 Iowa, 324.

⁶ *Downey v. Jerrard*, 3 Grant Cas. 64.

Property sold in a foreclosure suit was purchased by a solicitor whose name appeared on the particulars of sale as one of several solicitors from whom particulars could be obtained. He was not solicitor to any of the parties to the suit, but was to some creditors of the mortgagee, one of whom had obtained a decree for administration of the mortgagee's estate. The solicitor had two days before the sale taken out a summons, to obtain leave for the plaintiff in the administration suit to attend proceedings in a foreclosure suit; such summons being returnable on the day after the sale. He had never been consulted about the sale, and did not know what was the amount of the reserved bidding. The solicitor was held not disqualified from purchasing, for that his client was at liberty to purchase, and therefore his being her solicitor did not disqualify him.¹ But where an attorney for a defendant sold the latter's property and directed the sale for a few dollars costs, and became a purchaser himself, the transaction was set aside on the ground of fraud.²

An attorney, on the application of his client for advice upon the question whether an equitable interest which the client had in certain land could be reached by a creditor, procured from the client an assignment of that equitable interest for a grossly inadequate consideration, the proceeding being recommended by the attorney for the purpose of defrauding the creditor, and he promising to reconvey after an arrangement should have been made with the creditor. The attorney procured a conveyance of the land to himself, and claimed to hold it absolutely as against the client. The court held that although the agreement was illegal, and the law would not relieve either party against the other when they stood upon an equal footing, yet the rule prohibiting an attorney from obtaining any advantage in a transaction with his client must prevail, and that the attorney must reconvey the land, upon the refunding of the consideration paid.³

An attorney who issues an execution cannot become a purchaser at the sheriff's sale, either on his own account or as the agent of a third person, without the consent and against the interest of his client, and leaving the client's debt unsatisfied; but

¹ *Guest v. Smythe*, 5 Law R. Ch. 551. See 30 & 31 Vict. chap. 48, sec. 7.

² *Byers v. Surget*, 19 How. 303.

³ *Ford v. Harrington*, 16 N. Y. 285.

when the client himself is not prohibited from purchasing, the attorney may purchase with his assent, and neither the defendant in the execution, or a third person, can object to the validity of such a purchase.¹ But if the attorney purchases property at sheriff's sale, under an execution of which he has control, and the circumstances warrant an inference of unfairness in the sale, the attorney will be held trustee for his client.²

Counsel who has been consulted about a title to land will not be permitted to purchase an outstanding one, and set it up in opposition to his client.³ If he does, it enures to the benefit of the client.⁴

The attorney cannot be permitted to buy for himself, property at a sale at which he represents the execution plaintiff, at less than the execution debt.⁵ If he purchases, he will be held to be trustee for his client.⁶ The burden is on the attorney to prove that the transaction was fair, intelligent, and free. But there can be no recovery unless actual damage to the client be proved.⁷ If the client chooses to permit the attorney to accept and retain an interest more or less conflicting with that of the client, this may afterward estop the client from disputing the lawyer's right so to act. But to work such an estoppel, the client must have acted with a full knowledge of all the circumstances, must have been competent so to act, and must have acted without restraint.⁸

§ 275. Exceptions to the rule.—There have been cases of purchases from clients, when in the absence of all fraud and misrepresentation, the courts have refused to set aside the sale. Where a solicitor had purchased an estate from his client, al-

¹ *Hawley v. Cramer*, 4 Cowen, 717.

² *Mackay v. Martin*, 26 Tex. 57.

³ *Hockenbury v. Carlisle*, 5 Watts & S. 348; *Cleavinger v. Reimer*, 3 Ibid. 486.

⁴ *Galbraith v. Elder*, 8 Watts, 81. But see *De Vinney v. Norris*, 8 Watts, 314.

⁵ *Leisenring v. Black*, 5 Watts, 303.

⁶ *Howell v. Baker*, 4 Johns. Ch. 118; *Downey v. Gerrard*, 3 Grant Cas. 64; *Moore v. Bracken*, 27 Ill. 23; *Giddings v. Eastman*, 5 Paige, 561; *Stockton v. Ford*, 11 How. 232; *Case v. Carroll*, 35 N. Y. 385.

⁷ *Howell v. Ransom*, 11 Paige 538; *Jennings v. McConnell*, 17 Ill. 148; *Hawley v. Cramer*, 4 Cowen, 717; *Evans v. Ellis*, 5 Den. 640; *Wendell v. Rensselaer*, 1 Johns. Ch. 344; *Miles v. Irwin*, 1 McCord, 524; *Kisling v. Shaw*, 33 Cal. 424.

⁸ As to laches, see *Marsh v. Whitmore*, 21 Wall. 178; *Williams v. Reed*, 3 Mason, 405.

though the solicitor was also trustee for the sale of the estate for payment of debts, the purchase was confirmed upon the ground of his having attempted ineffectually to sell, of the absence of fraud, and of the purchase having been recognized and approved by the *cestui que trust*.¹

So a grant of a leasehold interest from a client to his attorney, who was a near relation, in consideration of money secured by bond, afterward released, and in consideration of being indemnified from all costs, if the title should be impeached, the attorney re-demising to the client at a nominal rent for the lives of the client and his wife, was supported as against the next of kin of the client who acquiesced in, and recognized it as fair.²

A client had a reversionary interest which an attorney purchased. In the event, the purchase became advantageous to the attorney, but without fraud or misrepresentation, as at the time of the purchase both were ignorant of the value. The proposal for the sale came from the client. A bill charging fraud and misrepresentation, confidence and knowledge on the one side, with ignorance on the other, and not bringing forward the only incorrect circumstance, viz: the receipt taken as for money paid, although the consideration was by deduction from bill of costs, not then of that amount, was dismissed.³

When a solicitor purchases or obtains a benefit from a client he must, therefore, show that he has taken no advantage of his professional position, but has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger.⁴ If an attorney can show that he is entitled to purchase property, notwithstanding his character of attorney or agent, and yet, if instead of openly purchasing it, he purchases it in the name of a third person as his agent or trustee, without disclosing the fact, the purchase is void.⁵ The purchase of a subject-matter of a suit by an attorney being generally void as against the policy of the law, it makes no difference that the attorney is not the purchaser on the record.⁶ A gift by a client

¹ *Clark v. Swaile*, 2 Eden, 134; *Revett v. Harvey*, 1 Sim. & St. 502; *Ex parte James*, 8 Ves. 337. See also *Phayre v. Peree*, 3 Dow, 117.

² *Bellew v. Russell*, 1 Ball & B. 96.

³ *Montesquieu v. Sandys*, 1 Ball & B. 304.

⁴ *Savery v. King*, 5 H. L. Cas. 627; 2 Jur. N. S. 503; 25 Law J. Ch. 482.

⁵ *Lewis v. Hillman*, 3 H. L. Cas. 607.

⁶ *Simpson v. Lamb*, 7 El. & B. 84; 3 Jur. N. S. 412; 26 Law J. Q. B. 121.

to a solicitor during the relation is also against the policy of the laws, and generally void.¹ Solicitors acting as trustees are entitled to costs out of pocket, but not for services performed by themselves as solicitors in executing the trust. The rule, however, it is said, does not extend beyond their acting as solicitors for themselves.²

So far as concerns third parties the sales are valid, but the privilege of disannulling the sales belongs to the client. A third person after the sale cannot set up the client's interest in opposition to the lawyer.³

§ 276. No extortionate agreement as to compensation will be sustained by the courts. While generous allowances will be made to counsel struggling in behalf of a helpless client, to maintain a claim ultimately pronounced to be just; and while fees are proportioned to responsibility as well as skill and labor; yet if a lawyer takes advantage of his position to obtain excessive or oppressive gifts or fees, not only may they be recovered back by the client, but the act may be punished by the court.⁴

There are many cases, however, in which, if the lawyer does not help the client by buying or agreeing to buy the client's property, the client will be ruined. To preclude the client from being aided by the lawyer would often preclude the client from being aided at all. But to sustain sales of this character two conditions are essential: 1st. The sale must be fair. The client must know the value of the thing sold, and if there be an exchange, the value of the thing offered for it. 2nd. The sale must be free. The client must not be constrained to it by his position. If so constrained the contract will be avoided by the

¹ *O'Brien v. Lewis*, 9 Jur. N. S. 528; 32 Law J. Ch. 569; 11 Week. R. 318; 8 Law T. N. S. 179.

² *Cradock v. Piper* 1 Macn. & G. 664; 1 Hall & T. 617; 14 Jur. 97; 19 Law J. Ch. 107; *Clark v. Carlon*, 7 Jur. N. S. 441; 30 Law J. Ch. 639; 9 Week. R. 568; 4 L. T. N. S. 361; *Harbin v. Darby*, 28 Beav. 325; 6 Jur. N. S. 906; 29 Law J. Ch. 622; 8 Week. R. 512; *New v. Jones*, 1 Macn. & G. 668; 1 Hall & T. 632. But see *Lincoln v. Windsor*, 9 Hare, 158; 15 Jur. 765; 20 Law J. Ch. 531; *Broughton v. Broughton*, 5 De Gex, M. & G. 160; 1 Jur. N. S. 965; 25 Law J. Ch. 250.

³ *Leach v. Fowler*, 22 Ark. 143; *Wall v. Cockerell*, 10 H. L. Cas. 229.

⁴ *Wharton on Agency*, secs. 575, 576, 577, 618; *Gardnor v. Ennor*, 35 Beav. 549; *Richards v. French*, 32 Law T. N. S. 327; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Rose v. Mynett*, 7 Yerg. 30; *Lecatt v. Sallee*, 3 Porter, 115; *Downing v. Major*, 2 Dana. 228.

court; and of such constraint, unfairness of terms is strong presumptive proof.¹

§ 277. Purchase of subject-matter of controversy.—

The purchase by an attorney of an interest in the thing in controversy in opposition to the title of his client is forbidden, because it places him under temptation to be unfaithful to his trust. Such a purchase, therefore, may inure to the benefit of the client. An attorney who has been employed professionally to sustain a title to land may not, either before or after the cause is ended, or during the continuance, or after the termination of the relation of counsel and client, while the client holds, or after he has conveyed his interest, purchase for himself any outstanding title; if he does it may inure to the client or his vendee, who may recover the premises from the counsel by paying or tendering the amount of the purchase money with interest; and a purchaser from such counsel with notice of the facts is in the same situation.²

§ 278. Purchase of claims.—In New York, in 1807, the Legislature interposed to prevent attorneys from buying notes or claims for the purpose of bringing suit upon them, and declared it a misdemeanor. The law was re-enacted in 1813, and

¹Wharton on Agency, sec. 574; *Hunter v. Atkyns*, 3 Mylne & K. 113; *Gibson v. Jeyes*, 6 Ves. 277; *Jenkins v. Gould*, 3 Russ. 385; *Edwards v. Myrick*, 2 Hare, 60; *Tyrrell v. Bank*, 10 H. L. Cas. 26; *Simpson v. Lamb*, 7 El. & B. 54; *Lewis v. Hilman*, 3 H. L. Cas. 607; *Savery v. King*, 7 Ibid. 627; *Surgett v. Byers*, Hemp. 715; *Mott v. Harrington*, 12 Vt. 199; *Mills v. Mills*, 26 Conn. 213; *Arden v. Patterson*, 5 Johns. Ch. 44; *Howell v. Baker*, 4 Johns. Ch. 118; *Story v. Vanderheyden*, 9 Johns. 253; *Howley v. Cramer*, 4 Cowen, 718; *Lewis v. J— A—*, 4 Edw. Ch. 599; *Berrien v. McLane*, 1 Hoff. Ch. 421; *Poillon v. Martin*, 1 Sand. 1; *Barry v. Whitney*, 3 Sand. 696; *Howell v. Ransom*, 11 Paige, 538; *Evans v. Ellis*, 5 Den. 640; *Ford v. Harrington*, 16 N. Y. 285; *Bibb v. Smith*, 1 Dana, 582; *Jennings v. McConnell*, 17 Ill. 148; *Gray v. Emmons*, 7 Mich. 533; *Valentine v. Stewart*, 15 Cal. 387; *Miles v. Ervin*, 1 McCord, 524; *Buffalow v. Buffalow*, 2 Dev. & B. Eq. 241. Where an attorney offered his client's bonds at public sale and bought them himself at their full value at the time, the client being aware of the purchase, and having acquiesced in it for twelve years, the Supreme Court of the United States held that it was too late for the client to attempt to impeach the validity of the sale. (*Marsh v. Whitmore*, 21 Wall. 178.)

Henry v. Raiman, 25 Pa. 354; *Zeigler v. Hughes*, 55 Ill. 288; *Harper v. Perry*, 28 Iowa, 57; *Wheeler v. Willard*, 44 Vt. 640; *Davis v. Smith*, 43 Vt. 269; *Case v. Carroll*, 35 N. Y. 385. See, also, *Howell v. Baker*, 4 Johns. Ch. 117; *Moore v. Bracken*, 27 Ill. 23; *Giddings v. Eastman*, 5 Paige, 561.

not being rigorous enough to prevent abuses and evasions, a new and more stringent statute was passed in 1818, which prohibited all purchases of claims by attorneys irrespective of the intent to prosecute them. The statute was resisted in the courts; but it was sustained and enforced.¹ Afterward, however, the law was modified by amending it so as to limit its application to cases where the purchase of the claims was made "with the intent and for the purpose of bringing suit," and with this qualification it remained a part of the statute law.² Under this law a prominent member of the New York bar, acting in good faith for a corporation and in its special interest, became the purchaser at a receiver's sale of various claims, under the supposition that his clients would ratify the act. This they refused to do, and repudiated the purchase. He assumed the ownership himself, and brought suit upon the claims. The statute was set up against him, and the court held he could not recover.³

§ 279. Information received from the client.—An attorney cannot use information received by him from his client in opposition to the client. An attorney, for instance, who has been consulted respecting the title to lands, cannot afterward become a purchaser of such lands from the State or from a third party, to use against his client. Such a purchase will enure to the benefit of the client.⁴ But it is said that the fact that in other independent suits an attorney became acquainted with the business of the adverse party, will not prevent him from acting professionally against such party.⁵

§ 280. Investment of moneys.—When moneys, which form part of a larger sum placed by the client in the hands of a solicitor for purposes of investment, are lent by him on the security of a mortgage, in which he has affected to act as prin-

¹ See *ante*, sec. 121; *People v. Walbridge*, 6 Cowen, 572; S. C. 3 Wend. 120.

² Rev. Stats. N. Y. 288, sec. 71; Reviser's Notes, 3 Rev. Stats. 2nd ed. 697.

³ *Mann v. Fairchild*, 2 Keyes, 106.

⁴ Wharton on Agency, sec. 578; *Carter v. Palmer*, 8 Clark & F. 657; *Paley on Agency*, 34*n*; *Galbraith v. Elder*, 8 Watts, 81; *Cleavinger v. Reimar*, 3 Watts & S. 486; *Taylor v. Blacklow*, 3 Bing. N. C. 235; 3 Scott, 614; *Williamson v. Moriarty*, 19 Week. R. 818; *Henry v. Raman*, 25 Penn. 354; *Reed v. Norris*, 2 Mylne & C. 374. But see *Porter v. Peckham*, 44 Cal. 204.

⁵ *Price v. Railroad*, 18 Ind. 137.

cipal, the client is bound by notice of all the circumstances which come within the attorney's knowledge.¹ And where money is intrusted to an attorney by his client, without any particular investment being in contemplation, and is allowed to remain in the hands of the solicitor, the amount becomes a debt due from the attorney to the client. If the attorney afterward misapplies the money, and to cover his fraud obtains from another client a transfer of an equitable interest under a previously executed mortgage, no money of the first client being paid to the second, the transfer thus obtained may, on the latter's discovering the fraud, be set aside in equity; for no money having passed at the time the transfer was executed, no interest passed by its execution.²

§ 281. Gifts by the client.—It appears that in the absence of fraud, misrepresentation, or circumvention, a client may make a voluntary gift to his attorney or agent, and in such case it will not be set aside;³ but third parties should be present to witness the fairness of the transaction, as a suspicion will always attach.⁴ Courts of equity have on principles of public policy set aside gifts made by clients to their attorneys without actual fraud, during the period when the attorney has in his hands the management of his client's affairs.⁵ But when the cause is finished and the relation no longer exists, the gift will not be set aside.⁶ In a gift by a testator, it is not decisive evidence of fraud that the attorney who drew the will was one of the residuary legatees.⁷ Yet it seems to be both English and American doctrine, as laid down in some cases, that the attorney cannot, while the business with his client is unfinished, receive from him any gift, or bind his client in any mode to make him greater compensa-

¹ *Spaight v. Cowne*, 1 Hem. & M. 359.

² *Wall v. Cockerell*, 10 H. L. Cas. 229; 11 Week. R. 442; 8 L. T. N. S. 1. See generally as to retainer and employment, *Seewell v. Allen*, 17 L. J. Ex. 246; *Painter v. Abell*, 11 Week. R. 651; 8 L. T. N. S. 287; 33 L. J. Ex. 60; *Gemmell v. Macalister*, 9 Jur. N. S. 285; 11 Week. R. 486; 7 L. T. N. S. 841.

³ *Walmsley v. Booth*, 2 Atk. 40; *Craig v. Mansfield*, 1 Ves. 379; *Oldham v. Hand*, 2 Ves. 259, 549.

⁴ *Harris v. Tremenheere*, 15 Ves. 40; and see *Haguennin v. Barclay*, 14 Ves. 300; *Gibson v. Jeyes*, 6 Ves. 267; 13 Ves. 52, 138.

⁵ *Welles v. Middleton*, 1 Cox, 112; *Montesquieu v. Sandys*, 1 Ball & B. 312.

⁶ *Ibid*; *Oldham v. Hand*, 2 Ves. 259; *Harris v. Tremenheere*, 15 Ves. 84.

⁷ *Paine v. Hall*, 18 Ves. 475.

tion for his services than he would have a right to demand if no contract should be made during the relation. Such a gift so accepted may be recovered back by the client in a court of chancery, or by the client's creditors, if necessary for them to assert a right to it to satisfy their demands. When the relation of attorney and client exists, and security is taken by the former from the client, the presumption is that the transaction is unfair, and the onus of proving its fairness is upon the attorney.¹

In all matters of gift or contract between attorney and client, the greatest fairness is exacted, and the burden of proof as to the rectitude of the transaction is on the attorney; and upon failure to make proof, equity treats it as one constructive fraud.²

§ 282. Rendering accounts.—The duty of rendering proper accounts is imperative upon attorneys, and it may in all proper cases be enforced against them. The attorney must place his client in full information of all money transactions concerning his business; he must inform him of his true interest. If he takes an unfair advantage of his client's confidence, accounts settled for many years will be opened, even though the vouchers have been surrendered.³ Courts of equity will require this if the client has been imposed upon. In cases of unfairness and improper use of influence, the account may be opened at any time. If the vouchers have been delivered up and cannot be found, the oath of the party must be admitted as to their contents.⁴ A solicitor may even be liable for not compelling a receiver of an estate to account and pay over a balance, but this is rather upon the ground of the attorney's liability for negligence.⁵

¹ *Evans v. Evans*, 5 Denio, 640; *Newman v. Payne*, 2 Ves. 199; *Walmsley v. Booth*, 3 Atk. 25; *Montesquieu v. Sandys*, 18 Ves. 313; *Stockton v. Ford*, 11 How. 247; *Starr v. Vanderheyden*, 9 Johns. 253; *Howell v. Ransom*, 11 Paige, 538; *De Rose v. Fay*, 4 Edw. Ch. 40; *Lewis v. J. A.*, *Ibid.* 599; *Berrien v. McLane*, 1 Hoff. Ch. 424; *Miles v. Ervin*, 1 McCord, 524; *Rose v. Mynell*, 7 Yerg. 30; *Bibb v. Smith*, 1 Dana, 482; *Smith v. Thompson's Heirs*, 7 Mon. B. 308; *Jennings v. McConnell*, 17 Ill. 148; *Lecatt v. Sallee*, 3 Porter, 115.

² *Jennings v. McConnell*, 17 Ill. 148. See *Atwood v. Mansfield*, 59 Ill. 496.

³ *Lewes v. Morgan*, 3 Anstr. 769; *Morgan v. Lewes*, 4 Dow. 29; *Lewes v. Morgan*, 5 Price, 42; affirmed on appeal to House of Lords, and rehearing, 3 Younge & J. 230; *Browne v. Pring*, 1 Ves. Sr. 407; *Drapers Co. v. Davis*, 2 Ack. 295; *Abbey v. Patch*, 1 Younge & C. Ch. 258; *Starr v. Vanderheyden*, 9 Johns. 253.

⁴ *Ibid.*; *Newman v. Payne*, 2 Ves. 199.

⁵ 18 Ves. 72; *Ross v. Sterling*, 4 Dow. 442.

If an account is settled, and a security is taken by an attorney from his client, the transaction will be viewed with suspicion ; but still is not to be treated as a nullity ; unless the attorney fail to afford to his client all the information he possesses connected with his demand, and the nature of the security. If such be the case, the security cannot be enforced. In a suit to enforce a security by way of mortgage, from a client to an attorney, the latter would be liable for the costs, if it were shown that the security exceeded the amount claimed and the amount due.¹

¹ *Dunson v. Paterson*, 11 Jur. 96; 8 L. T. 313; *Higgins v. Joyce*, 2 Jones & L. 282; *Jones v. Roberts*, 9 Beav. 419; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Bristol v. Dana*, 12 Wend. 142; *Hewel v. Baker*, 4 Johns. Ch. 118; *Bibb v. Smith*, 1 Dana, 582; *Phelps v. Overton*, 4 Hayw. 292; *Downing v. Major*, 2 Dana, 228; 7 Yerg. 30.

CHAPTER XII.

LIABILITY OF ATTORNEYS TO THEIR CLIENTS—NEGLIGENCE
—REMEDIES OF CLIENTS AGAINST THEIR ATTORNEYS BY ACTION, ETC.

- § 283. Liability to client.
- § 284. What skill, care, and diligence required.
- § 285. Skill required.
 - § 286. Liability for mistakes.
 - § 287. Liability for blunders in process, and formal proceedings.
 - § 288. Liability for ignorance of the law.
 - § 289. Effect of locality on the rule.
 - § 290. Attorney not expected to guarantee success.
- § 291. Care required.
- § 292. Diligence required.
- § 293. Liability for negligence.
 - § 294. Neglect of attorney is neglect of client as to third parties.
 - § 295. Usual remedy.
 - § 296. Legal and equitable actions.
 - § 297. Negligence in conduct of a cause.
 - § 298. Position of burden of proof in cases of negligences.
 - § 299. Instances of negligence.
 - § 300. Pleading and evidence in actions for negligence.
 - § 301. Sufficient count in an action for negligence.
 - § 302. Negligence as a defense to an action for fees.
 - § 303. Negligence of associates.
- § 304. Liability for matters not litigated.
- § 305. Liability for acting in excess of authority.
- § 306. Liability for acting without authority.
- § 307. Collection and appropriation of money.
- § 308. Payment of money.
- § 309. Accounting and payment.
- § 310. Liability for disclosing secrets.
- § 311. Investigation of titles—Investment of money—Sufficiency of securities.
- § 312. Advice as to titles.
- § 313. Effect of nonpayment of fees.
- § 314. Liability of law-partners.
- § 315. Attorneys' books.
- § 316. Liability for abandonment of suit.
- § 317. Other liabilities.
- § 318. Not liable for acts not within the scope of their profession.
- § 319. Measure of damages.
- § 320. Statute of Limitations.

§ 283. Liability to the client.—In taking a survey of the duties of an attorney toward his client, we had occasion to re-

mark in the preceding chapter that the attorney owed to the client skill, care, and diligence in conducting his business. But what kind of skill? How much care? And what degree of diligence? To answer these questions will be the purpose of the present chapter; in which we shall consider the results of a failure to exercise these things, such failure being considered by the law to be negligence on the part of the attorney, for which negligence he may be held pecuniarily responsible by the client. The corresponding remedy of the client to obtain the benefits of this legal liability will also be discussed.

§ 284. Degree of skill, care, and diligence required.—

The attorney is responsible to his client only for the want of ordinary care, and ordinary skill, and reasonable diligence. An attorney is not answerable for every error or mistake; he should not be held liable in cases of reasonable doubt.

Attorneys, says Lord Mansfield, "ought to be protected, when they act to the best of their skill and knowledge. But every man is liable to error, and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client from the person who stands indebted to him. A counsel may mistake as well as an attorney. Yet no one will say that a counsel that has been mistaken shall be charged with the debt. The counsel, indeed, is honorary in his advice, and does not demand a fee. The attorney may demand compensation. But neither of them ought to be charged with the debt for a mistake. Not only counsel but judges may differ or doubt, or take time to consider. Therefore, an attorney ought not to be liable in cases of reasonable doubt."

"No attorney," said Abbott, C. J., afterward Lord Tenterden, "is bound to know all the law; God forbid that it should be imagined that an attorney or counsel, or even a judge, is bound to know all the law, or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into."¹

¹ *Montrion v. Jefferys*, 2 Car. & P. 113; *Pitt v. Valden*, 4 Burr. 2060. An attorney is bound to exercise reasonable diligence and skill, and the skill required

It is difficult to fix upon any rule which shall define what is negligence in a given case. If the ordinary and average degree of skill and diligence could be determined, it has been held that this would furnish the true rule. It is said that the attorney is to be protected when he acts in good faith, and to the best of his skill and knowledge.¹ The want of ordinary care and skill is gross negligence.² In the United States an attorney is vested with some discretionary power; especially where the client resides at a considerable distance. An attorney ought not to be held liable where he has acted honestly, and in his opinion, for the best interests of his client.³

But if an attorney disobeys express lawful instructions of his client, and a loss ensues, he is responsible for it.⁴ If he is instructed to bring suit upon a note, and acting under the honest impression that he would best promote his client's interests by not bringing suit immediately, he omits to do so, and the money is afterward lost by the insolvency of the maker, the attorney is liable in an action against him, and the measure of damages is what might have been recovered if suit had been brought at first.⁵ A client has, however, as we have seen, usually no right to control his attorney in the due and orderly conduct of a suit, and it is his duty to do what the court would order to be done, though his client instruct him otherwise.⁶ So far as the rules of law permit, it is safer for counsel to follow a client's instruction, if a client refuses to follow advice after it is given to the best of the attorney's judgment.⁷ In bringing suits, attorneys are responsible for losses caused by their disregard of rules of law which are well and clearly defined, both in the text-books and reports, and which have existed and been published

has reference to the character of the business he has undertaken to do. (*Cox v. Sullivan*, 7 Ga. 144; *Holmes v. Peck*, 1 R. I. 242; *Pennington v. Yell*, 6 Eng. Ark. 212.)

¹ *Gilbert v. Williams*, 8 Mass. 57; 19 Eng. C. L. 136.

² *Holmes v. Peck*, 1 R. I. 245; *Cox v. Sullivan*, 7 Ga. 144; *Pennington v. Yell*, 6 Eng. 212.

³ *Lynch v. Commonwealth*, 16 Serg. & R. 368; *Stokely v. Robinson*, 10 Casey, 317.

⁴ *Gilbert v. Williams*, 8 Mass. 57.

⁵ *Cox v. Livingstone*, 2 Watts & S. 103; *Wilcox v. Plummer*, 4 Peters, 172.

⁶ *Anon.* 1 Wend. 108; *Read v. French*, 28 N. Y. 285.

⁷ *Nave v. Baird*, 12 Ind. 318.

long enough to justify the belief that they are well known to the profession.¹

It is no answer for an attorney, when sued in detinue for a deed which has been intrusted to him by a client, to say simply that he has lost it.² The client seems not bound to any particular degree of diligence, unless expressly stipulated for.³ As it is the duty of an attorney to communicate to his client whatever information he acquires in relation to the matters placed in his hands, he will be presumed, in the absence of proof, to have discharged his duty.⁴ And it is held a fair presumption that an attorney acts according to his client's instructions, unless in case of such gross negligence that a violation may be inferred.⁵

§ 285. Skill required.—Tindal, C. J., says: "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace, precisely, the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish, in general, that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice; for want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. But, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law."⁶ The same judge

¹ Goodman v. Walker, 30 Ala. 482.

² Reeve v. Palmer, 5 Com. B. N. S. 84; Northwestern Company v. Sharp, 28 Eng. L. & E. 555. See Huntley v. Company, 1 Fost. & F. 211. An attorney whose office has been broken open, and papers stolen therefrom, without negligence on his part, is not liable for the loss. (Hill v. Barney, 18 N. H. 607.)

³ Cox v. Sullivan, 7 Ga. 144.

⁴ Pierce v. Red Bluff Hotel Co. 31 Cal. 160.

⁵ Holmes v. Peck, 1 R. I. 242.

⁶ Godefroy v. Dalton, 6 Bing. 467; 4 Moore & P. 149.

in another case also observes: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case; nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable, and competent degree of skill, and," (addressing the jury) "you will say whether in this case the injury was occasioned by the want of such skill in the defendant."¹ And Lord Cottenham, delivering a unanimous judgment in the House of Lords, also remarks: "Professional men possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence with affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion. Every case, therefore, ought to depend upon its own peculiar circumstances; and when an injury has been sustained which could not have arisen except from the want of such reasonable skill and diligence, or the absence of either, the law holds the attorney liable. In undertaking the client's case, he undertakes for the existence, and for the due employment of these qualities."²

The law requires an attorney to be acquainted with the practice of his court, with the ordinary rules of pleading and evidence, the existence of statutes and rules of court, and in cases free from doubt, with their construction also.³ To illustrate, bringing an action of assumpsit on a deed under the common-law system,⁴ suing in a court of limited jurisdiction, for a debt which was contracted out of the jurisdiction, the blunder result-

¹ *Lamphier v. Phipos*, 8 Car. & P. 475; *White v. Washington*, 1 Barnes, 302; 2 Barnes, 4; *Holmes v. Peck*, 1 R. I. 242; *Walpole's Administrator v. Carlisle*, 32 Ind. 415; *Stephens v. Walker*, 55 Ill. 151.

² *Hart v. Frame*, 6 Clark & F. 193; S. C. 3 London Jurist, 550. See, also, *Pitt v. Yalden*, 4 Burr. 2061, per Lord Mansfield; *Saidler v. Elliott*, 3 Barn. & C. 738; 5 Dowl. & R. 635; *Russell v. Palmer*, 2 Wils. 325; *Kemp v. Burt*, 4 Barn. & Adol. 424; 1 Nev. & M. 262.

³ *Saidler v. Elliott*, 3 Barn. & C. 738; 5 Dowl. & R. 635.

⁴ *Cliffe v. Prosser*, 2 Dowl. O. S. 21.

ing in a nonsuit,¹ and omitting, from mistake, to procure the ordinary instruments of evidence,² are cases in which an attorney has been held liable for ignorance or want of skill. The offense must amount to *lata culpa* or *crassa negligentia*.³

It is actionable negligence to lay the venue in the wrong county.⁴ So to bring an action in a court which had no jurisdiction subjects the attorney to liability;⁵ and it is held that delay in bringing an action until too late, so that the claim was lost, renders the attorney liable;⁶ and so an attorney has been held liable for omitting to insert in a writ the full amount of his client's claim, whereby the latter sustained a loss.⁷ Carelessly and negligently conducting proceedings on a new trial, so that the order granting the same is reversed in the appellate court, will fix the liability of the attorney, even though the client employed other counsel in the appellate court; and so for negligence in not perfecting the appeal.⁸

§ 286. Liability for mistakes.—It has been ruled that attorneys are not liable for mistakes on difficult points of law, because, as Lord Mansfield observes, “not only counsel but judges may differ or doubt, and take time to consider.”⁹ As to matters peculiarly within his own province, an attorney is not liable for an error in case of reasonable doubt: but the question usually is, whether a proceeding has failed by the negligence of the attorney; and what is so doubtful as to exonerate him in acting on a mistaken construction is for the jury to decide, under the direction of the presiding judge.¹⁰ With these qualifications, every attorney, in undertaking the business of his client, professes himself to be acquainted with the duties imposed on him by statute,

¹ *Williams v. Gibbs*, 5 Ad. & E. 208.

² *Godefroy v. Dalton*, 6 Bing. 467; 4 Moore & P. 149. See, also, *Schillcock v. Passman*, 7 Car. & P. 289; *Hart v. Frame*, 6 Clark & F. 193; 3 London Jurist, 547; *Hopping v. Quin*, 12 Wend. 519.

³ *Purvis v. Landall*, 12 Clark & F. 91.

⁴ *Kemp v. Burt*, 4 Barn. & Adol. 424.

⁵ *Williams v. Gibbs*, 5 Ad. & E. 208.

⁶ *Smedes v. Elmendorf*, 3 Johns. 185.

⁷ *Varnum*, 15 Pick. 440.

⁸ *Drais v. Hogan*, 50 Cal. 121.

⁹ *Pitt v. Yalden*, 4 Burr. 2060.

¹⁰ *Reece v. Rigby*, 4 Barn. & Ald. 202; *Hunter v. Coldwell*, 16 L. J. Q. B. N. S. 274; *Lynch v. Commonwealth*, 16 Serg. & R. 368.

rule of court, or the known and usual practice as proved by those who are conversant therewith; and if he further undertake to determine questions of law, and to act upon his own opinion, he will also be answerable for his errors.¹

But an honest and mutual mistake between the defendant and an attorney in regard to the retainer of the latter, by reason of which the latter fails to be represented at the trial, has been held to be ground for granting relief from the judgment.²

§ 287. Blunders in process and formal proceedings.—An attorney is generally liable for blunders in process. The papers he prepares should be correct in form. He does not *insure* them. He is not liable for latent errors in the records from which he copies. But if his papers are defective from lack of diligence on his part, or the part of his subordinates, he is liable for the loss.³ He is liable for injuries to his client arising from a mistake made in the preparation of the writ,⁴ and from failure to notify the client of essential facts,⁵ and from acts of negligence in suing out the claim.⁶ He is liable for mistakes in suffering judgment to go by default,⁷ and in misdescription in process.⁸ An attorney at common law is liable for all blunders and omissions in the conduct of the formal proceedings whereby his client is prejudiced as suffering judgment to go by default,⁹ neglecting to duly enter up judgment;¹⁰ to set aside irregular

¹ *Russell v. Palmer*, 2 Wils. 328; *Hart v. Frame*, 6 Clark & F. 193; *Stevenson v. Rowland*, 2 Dow & C. 219.

² *Bertline v. Baldwin*, 29 Ind. 16; *McKinley v. Tuttle*, 34 Cal. 235. But see *Kile v. Lumpkin*, 40 Ga. 506.

³ *Wharton on Agency*, sec. 598; *In re Bolton*, 9 Beav. 272; *In re Spencer*, 18 W. R. Ch. 240; *Varnun v. Martin*, 15 Pick. 450; *McWilliams v. Hopkins*, 4 Rawle, 382; *Dearborn v. Dearborn*, 15 Mass. 316; *Roobes v. Stone*, 2 Leigh, 650; *Reilly v. Cavanaugh*, 29 Ind. 435; *Oldham v. Sparks*, 28 Tex. 425.

⁴ *Varnum v. Martin*, 15 Pick. 450.

⁵ *McWilliams v. Hopkins*, 4 Rawle, 382.

⁶ *Dearborn v. Dearborn*, 15 Mass. 316; *Rootes v. Stone*, 2 Leigh, 650; *Reilly v. Cavanaugh*, 29 Ind. 435; *Oldham v. Sparks*, 28 Tex. 425.

⁷ *Godefroy v. Jay*, 7 Bing. 413; 5 Moore & P. 213; *Benton v. Craig*, 2 Miss. 198; *Evans v. Watrous*, 2 Port. 205; *Anon.* 1 Wend. 108; *Gaillard v. Smart*, 6 Cowen, 385.

⁸ *Taylor v. Gorman*, 4 I. R. Eq. 550.

⁹ *Godefroy v. Jay*, 7 Bing. 413; S. C. 5 Moore & P. 213; *Benton v. Craig*, 2 Miss. 198; *Evans v. Watrous*, 2 Port. 205; *Anon.* 1 Wend. 108; *Gaillard v. Smart*, 6 Cowen, 385.

¹⁰ *Flower v. Bolingbroke*, 1 Str. 639; *Fitch v. Scott*, 3 How. (Miss.) 314; *Hogg v. Martin*, Riley, 156; *Cox v. Livingston*, 2 Watts & S. 103.

proceedings; to prevent the claim being barred by lapse of time; to prepare for trial;¹ to subpoena the requisite witnesses;² attend the trial at the appointed time,³ or the referee in case of a reference,⁴ or at any stage of the cause where the attorney's presence may be requisite,⁵ and it is for the jury to say, on the trial for negligence, what damages the client has sustained.⁶

The attorney is bound to show the diligence of a good practitioner in the prompt issuing of writs of execution, and such writs as are proper to make good a judgment when obtained.⁷ He is liable both as to the proper parties to be sued and the form and order of proceeding, if the law is plain and unmistakable.⁸ Though an attorney is not liable for a mistake in a nice and difficult point of law, yet if he depart from the ordinary mode of preparing a security it may be otherwise.⁹ An attorney, in a purchase or a mortgage transaction, undertakes to investigate only the legal requisites of a title, and not its value. He must use due and proper care and diligence in and about ascertaining the title, and take due and proper care that it is a sufficient security for repayment in *point of law*, not of *amount*.¹⁰

§ 288. Liability for ignorance of the law.—It has been said that if a person not legally authorized to practice law is employed to conduct a suit, he is not legally responsible to his employer for loss sustained by the latter in consequence of the former's ignorance.¹¹ But one who though not in fact a licensed

¹ Roufigny v. Peale, 3 Taunt. 484; Lowry v. Guildford, 5 Car. & P. 234.

² Reece v. Rigby, 4 Barn. & Ald. 202; Price v. Bullen, 3 Law J. K. B. 39.

³ Nash v. Swinburne, 3 M. & G. 630; 4 Scott N. S. 326; Ronfigny v. Peale, 3 Taunt. 484.

⁴ Swannell v. Ellis, 1 Bing. 347; Atcheson v. Madock, Peake, 163.

⁵ Dauntley v. Hyde, 6 Jur. 163. See Lowry v. Guildford, 5 Car. & P. 234.

⁶ Jones v. Lewis, 9 Dowl. 143; Hogg v. Martin, Riley, 156; Evans v. Watrous, 2 Port. 205; Crooker v. Hutchinson, 2 Chip. 117; Dearborn v. Dearborn, 15 Mass. 316; Eccles v. Stephenson, 3 Bibb. 517.

⁷ Wharton on Agency, sec. 598; Phillips v. Bridge, 11 Mass. 246; Dearborn v. Dearborn, 15 Mass. 316; Crooker v. Hutchinson, 2 Chip. D. 117; Hunter v. Caldwell, 10 Q. B. 69, 83; Curlew v. Broad, 1 Hurl. & C. 322; Godefroy v. Jay, 7 Bing. 413; 5 Moore & P. 284; Harrington v. Binns, 3 Fost. & F. 942.

⁸ Davies v. Jenkins, 11 Mees. & W. 745; 1 Dowl. & L. 321; 12 Law J. N. S. 386 Ex.; White v. Washington, 1 Barnes, 302; 2 Ibid. 4.

⁹ Stephenson v. Rowland, 2 Dow & C. 119.

¹⁰ Green v. Dixon, 1 Jur. 137; Howell v. Young, 5 Barn. & C. 259; Hayne v. Rhodes, 8 Q. B. 342.

¹¹ Wakeman v. Hazleton, 3 Barb. Ch. 148.

attorney acted in that capacity, and was the legal and confidential adviser of the plaintiffs, has been considered within the rule applicable to attorneys, to the extent that the court will relieve clients against a fraud to which their attorney was a party.¹ The attorney cannot be charged with negligence, when he accepts as a correct exposition of the law a solemn decision of the Supreme Court of the State, especially in advance of any decision of the Supreme Court of the United States.²

In many cases the only remedy a client has is against his attorney. Neither the ignorance, blunders, nor misapprehension of counsel, not occasioned by the adverse party, is a ground for vacating a judgment or decree.³ A court of equity will not grant relief on the ground of rights lost by a misapprehension of rules of practice,⁴ nor because counsel was surprised at a ruling which deprived him of the right of review on appeal, nor because an attorney, through design or ignorance, mismanaged the defense,⁵ or the client being absent on account of sickness, counsel through a mistake of facts consented to a decree,⁶ nor for error in preparing statements for new trial.⁷ In New York, however, courts have vacated judgments obtained through the ignorance or negligence of attorneys, on the ground that a client should not be ruined because he has retained "an incompetent, negligent, or unworthy attorney."⁸

The attorney is liable for the negligence of another attorney who is his agent, and he cannot shift responsibility from himself upon his client. There is no hardship in this, because it is in his power to limit his responsibility by the terms of his receipt, when he knows he must employ another to make the collection. And so, if the sub-agent collects the money and fails to pay it over.⁹ Where an attorney committed gross irregular-

¹ *Freelove v. Cole*, 41 Barb. 318.

² *Marsh v. Whitmore*, 21 Wall. 178.

³ *Freeman on Judgments*, sec. 508; *Boston v. Haynes*, 33 Cal. 31; *White v. Bank of U. S.* 6 Hamm. 539.

⁴ *Dibbee v. Trulock*, 12 Fla. 185; *Farmers' Co. v. Walworth Co. Bank*, 23 Wis. 249.

⁵ *Burton v. Hynson*, 14 Ark. 32.

⁶ *Burton v. Wiley*, 26 Vt. 430.

⁷ *Quinn v. Wetherbee*, 41 Cal. 247.

⁸ *Sharp v. Mayor*, 31 Barb. 578.

⁹ *Bradstreet v. Everson*, 72 Pa. 124; *Pollard v. Rowland*, 2 Blackf. 22; *Riddle v. Hoffman's Ex.* 3 Pa. 224; *Cummins v. McLain*, 2 Pike, 402; *Cox v. Livingston*,

ities in obtaining a decree of divorce for a wife, whereby the decree was vacated by the husband, the wife was allowed the moneys paid by her to her attorney for fees and expenses, as she had paid the money in ignorance of the fact that the judgment had been irregularly obtained; and as the judgment had been vacated on account of the ignorance and negligence of the attorneys, she was held entitled to recover damages also. The negligence and ignorance consisted in part of referring the cause before the time for the defendant to appear had expired, a total failure to substantiate the allegations of the complaint, etc.¹ The services and decree were, in this case, worse than useless, as the plaintiff, supposing she was free, had married again.

§ 289. Effect of locality on the rule.—It is to be observed that the business undertaken must be managed with the diligence and skill usual with good lawyers versed in the particular practice at the particular bar. A metropolitan standard is not to be applied to a rural bar. The lawyer is to exercise the diligence which good business men in such specialty are in such locality accustomed to exercise.²

As a person claiming to be an ordinary practicing lawyer must possess the skill and exhibit the diligence of lawyers in ordinary, so a person claiming to be an admiralty or equity lawyer, while not required to be an expert out of the department thus specified, must exercise due skill and diligence in it. In other words, the specialist is required to exhibit due skill and diligence in his specialty. By the English law, counsel are not, while attorneys are, responsible to their clients for negligence. In the United States of America, there is no distinction in this respect between counsel and attorneys. Both are responsible in the same manner and generally to the same extent as the attorney is by the English law.³

2 Watts & S. 103; *Wilkinson v. Griswold*, 12 Smedes & M. 669; *Krause v. Dorrance*, 10 Barr. 462; *Rhines v. Evans*, 16 P. F. Smith, 192; *Lewis v. Peck*, 10 Ala. 142.

¹ *Von Wallhoffen v. Newcomber*, 10 Hun. 236. See *Hopping v. Quinn*, 12 Wend. 517.

² Cases cited *supra*; *Pennington v. Yell*, 6 Eng. 212; Wharton on Negligence, sec. 750.

³ Green's note to Story on Agency, sec. 27 (1874).

§ 290. Not expected to guarantee success.—An attorney is not bound to proceed in a cause unless his legal fees are tendered or secured to him, if he requests it.¹ And he is not liable in a suit for damages, where he acts honestly and to the best of his ability.² There is no implied agreement in the relation of counsel and client, or the employment of the former by the latter, that the attorney will guarantee the success of his proceedings in a suit, or the soundness of his opinions, or that he will ultimately be sustained by a court of last resort. He only undertakes to avoid errors which no member of his profession of ordinary prudence, diligence, and skill would commit.³ He is not liable in any case of reasonable doubt.⁴

§ 291. Care required.—The failure to exercise proper care about a client's business is less pardonable than the failure to exercise proper skill, and is less leniently treated by the courts. It is not always that it is possible for an attorney to employ a great degree of skill, but he may generally, and is usually expected to bestow a considerable degree of care, attention, and diligence. In the first place, the attorney should thoroughly, and at an early period, acquaint himself with his client's case, inspect all instruments and documents bearing upon the case, and if practicable have personal interviews with clients.⁵

§ 292. Diligence required.—The attorney is held also to the exercise of reasonable diligence.⁶ It is the duty of an attorney who undertakes to collect a debt to sue out all process necessary to the object, and if he neglects to do so he is liable for the injury sustained by the client.⁷ And so, unless a creditor has left it entirely to the discretion of the attorney to bring a suit or not, it is his duty to bring action at once when employed to collect

¹ *Gleason v. Clark*, 9 Cow. 57; *Castro v. Bennet*, 2 Johns. 296.

² *Lynch v. Commonwealth*, 16 Serg. & R. 368.

³ *Bowman v. Tallman*, 27 How. Pr. 212; *Gallagher v. Thompson, Wright*, 466.

⁴ *Watson v. Muirhead*, 57 Pa. 161.

⁵ *Thwaites v. Mackerson*, 3 Car. & P. 341; *Gill v. Lougher*, 1 Crompt. & J. 170; *Montmorency v. Devereux*, 7 Clark & F. 188.

⁶ *Riddle v. Poorman*, 3 Pa. 224; *Gallagher v. Thompson, Wright*, 466; *Lowry v. Guilford*, 5 Car. & P. 234; *Stephens v. Walker*, 55 Ill. 151; *Walpole's Administrator v. Carlisle*, 32 Ind. 415.

⁷ *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 2 Chip. 117; 1 Vt. 73. See *McWilliams v. Hopkins*, 4 Rawle, 382.

a debt, and prosecute the suit with reasonable diligence, although he may think it would promote the best interests of his client not to sue.¹ So if he omit to deliver a *fi. fa.* to the sheriff in time, and the levy is lost in consequence,² and so where an attorney allowed a cause to be called without previously ascertaining whether a material witness had arrived, and his client was nonsuited because of the want of the evidence;³ and where, being retained to defend a suit, he allowed judgment to be taken for want of an answer.⁴ In all such cases the question of negligence is a question for the jury.⁵

And it is immaterial whether or not the suit be actually prosecuted or defended in his name, if he were originally retained by the party, or assumed the duty. Thus, where an attorney received a demand for collection, and undertook to have it recovered, if that could be accomplished, and at the time he received it did not himself practice in the county, but committed the demand to the care of his brother, who then resided and practiced there, it was held that he was bound to make good the collection of the judgment, so far as it was practicable by the application of reasonable diligence, skill and attention, and was liable for the neglect of the person employed by him for the purpose; although if the engagement had been merely that he would put the claim into the hands of some competent person for collection, and if he had so done, and informed the creditor of the name of such person, he would not have been accountable further.⁶ So where a demand was placed in the hands of two attorneys in partnership, for collection, and before the money was collected they dissolved partnership, and afterwards one of them received the money upon execution, and gave the sheriff a receipt therefor in his own name, and neglected to pay the money over to the client, both the attorneys were held liable as partners.⁷

¹ Cox v. Livingston, 2 Watts & S. 103.

² Phillips v. Bridge, 11 Mass. 246; Russell v. Palmer, 2 Wils. 325; Russell v. Stewart, 3 Burr. 1787.

³ Reece v. Rigby, 4 Barn. & Ald. 202.

⁴ Godefroy v. Jay, 7 Bing. 413; Rouffigny v. Peale, 3 Taunt. 484.

⁵ Brazier v. Bryant, 2 Dowl. O. S. 600; Cliffe v. Prosser, Ibid. 21.

⁶ Riddle v. Poorman, 3 Pa. 224.

⁷ Poole v. Gist, 4 McCord, 62.

Under the English system an attorney is not liable for the neglect, absence, or want of attention of the counsel engaged in the cause. (Lowry v. Guilford, 5 Car. & P. 234.)

When the attorney is chargeable with negligence, his contract is violated, and an action lies at once, and when not brought at once, it seems that the proof of actual damage may extend to facts growing out of the injury, even up to the day of the verdict;¹ and then it would appear that the attorney is liable in damages to be measured by the amount of the loss actually sustained, and not by the mere nominal amount of the demand for collection. Any fact which may tend to reduce the value of the debt below the nominal amount may also be considered by the jury;² but an attorney liable for a debt lost by his negligence is not liable for the evidence of the debt, and if sued he may show that the plaintiff has another remedy, which he has successfully pursued.³ In an action against an attorney for neglect in the management of a suit, it is unnecessary to aver that the plaintiff had secured him his fee or paid it to him. An averment that the defendant undertook to prosecute the suit for a sum thereafter to be paid, is sufficient.⁴ It is not a defense, either, that the attorney undertook the case without consideration. If he undertook to conduct the cause, and in his management of it was guilty of neglect, whereby the client was damaged, a want of consideration is not an answer.⁵

The lawyer is required to exhibit the skill and diligence usual to good professional men in that particular department. The diligence required must be in his professional relations; and an erroneous answer to a mere casual inquiry, to one not a client, does not render him liable.⁶ He is not required to possess *perfect* skill, nor is he required to possess the skill of the best men of his profession. He is not liable for an error of opinion as to an open and doubtful point of law.⁷ The lawyer is not bound to *diligentia diligentissimi*, the diligence of the most diligent, and hence is not liable for *levissima culpa*, or the slightest neg-

¹ Wilcox v. Executors, 4 Peters, 172.

² Crooker v. Hutchinson, 2 Chip. 117; Dearborn v. Dearborn, 15 Mass. 316; Eccles v. Stephenson, 3 Bibb, 517; Harter v. Morris, 18 Ohio St. 492.

³ Huntington v. Rumnell, 3 Day, 390.

⁴ Eccles v. Stephenson, 3 Bibb, 517.

⁵ Stephens v. White, 2 Wash. (Va.) 203.

⁶ Fish v. Kelly, 17 Com. B. N. S. 194.

⁷ Morrill v. Graham, 27 Tex. 646; Kemp v. Burt, 1 Nev. & M. 262; 4 Barn. & Adol. 424; Montrion v. Jefferys, 2 Car. & P. 113; Marsh v. Whitman, 21 Wall. 178.

ligence. Perfect knowledge and skill are prevented by the comprehensiveness of the profession, and the uncertainty of future litigation precludes perfect sureness of opinion.¹

The lawyer is expected to be honest and diligent, and to use a reasonable degree of care. He is only liable for gross negligence.² If the lawyer practices without the skill usual to good practitioners in his particular department he is chargeable with the consequences of the want of skill.³

§ 293. Liability for negligence.—The want of ordinary or reasonable diligence, or of ordinary care, constitutes negligence, and not only negligence, but such gross negligence as will fix the liability of the attorney. The attorney is not held to extraordinary skill or care; but such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. As an attorney is liable for *gross negligence and gross ignorance*, he is also entitled to the benefit of the rule that every one shall have been presumed to have discharged his legal and moral obligations until the contrary appears, and when

¹ Wharton on Negligence, sec. 744 *et seq.*; Lamphier v. Phipps, 8 Car. & P. 479; Bowman v. Tallman, 2 Robt. 385; S. C. 27 How Pr. 212; Weimer v. Sloane, 6 McLean, 259; Ex parte Giberson, 4 Cranch C. C. 503.

² Purves v. Landell, 12 Clark & F. 91; Blaikie v. Chandless, 3 Camp. 17; Pitt v. Holden, 4 Burr. 2060; Pitt v. Yalden, 4 Burr. 2066; Montrion v. Jefferys, 2 Car. & P. 113; Laidler v. Elliott, 3 Barn. & C. 738; Elkington v. Holland, 9 Mees. & W. 661; Chapman v. Van Toll, 8 El. & B. 407; Bulmer v. Gilman, 4 Man. & Gr. 108.

³ Cases cited supra: Donaldson v. Holdane, 7 Clark & F. 762; Evans v. Watrous, 2 Porter, 205; Wharton on Negligence, secs. 746-749; Crosby v. Murphy, 8 Ir. Com. L. R. 301; Hatch v. Lewis, 4 Post. & F. 407; White v. Washington, 1 Barnes, 302; 2 Ibid. 4; Wharton on Agency, 596; Lamphier v. Phipos, 8 Car. & P. 479; Palmer v. Ashley, 3 Pike, 75; Gilbert v. Williams, 8 Mass. 57; Holmes v. Peck, 1 R. I. 242; North W. R. R. v. Sharp, 10 Exch. 451; Thwaites v. Mackerssen, 3 Car. & P. 341; Gilbert v. Dynely, 3 Scott N. R. 364; S. C. 3 Man. & G. 12; Hart v. Frame, 6 Clark & F. 193; Mercer v. King, 1 Post. & F. 490; Lee v. Dixon, 3 Post. & F. 744; Parker v. Rolls, 14 Com. B. 691; Williams v. Gibbs, 6 Nev. & M. 788; Cox v. Leech, 1 Com. B. N. S. 617; Wilson v. Coffin, 2 Cush. 316. See also, Allen v. Clark, 1 N. R. 58; Wilson v. Russell, 20 Me. 421; Watson v. Muirhead, 57 Penn. 161; Lynch v. Com. 16 Serg. & R. 368; Bowman v. Tallman, 27 How. Pr. 212; Harter v. Morris, 18 Ohio St. 492; Pidgeon v. Williams, 21 Grat. 251; Goodman v. Walker, 30 Ala. N. S. 482; S. C. 21 Ala. N. S. 642; Cox v. Sullivan, 7 Ga. 144; Nisbet v. Lawson, 1 Ga. 275; O'Barr v. Alexander, 37 Ga. 195; Stubbs v. Beene, 37 Ala. 627; Spiller v. Davidson, 4 La. An. 171; Gambert v. Hart, 44 Cal. 542; Walpole v. Carlisle, 32 Ind. 415; Hastings v. Halleck, 13 Cal. 203; Stevens v. Walker, 55 Ill. 151; Gleason v. Clark, 9 Cowen, 57; Varnum v. Martin, 15 Pick. 440; In re Spencer, 21 Law T. N. S. 808; 39 Law J. Ch. 841; Godfroy v. Dalton, 6 Bing. 568; Grayson v. Wilkinson, 5 Smedes & M. 268.

made to appear, the extent of the damages must also be affirmatively shown.¹ As where the amount of a note is alleged to have been lost by the attorney's negligence, it must be shown that it was a subsisting debt against the maker, and also that he was solvent. If this be not shown, the attorney is liable only for nominal damages, and under no circumstances is he liable for more than the actual damages sustained by his negligence.²

The attorney is not liable to one between whom and himself the relation of attorney and client does not exist, for giving in answer to a casual inquiry erroneous information as to the contents of a deed.³ It is not every mistake or misapprehension of an attorney that will make him liable in an action for negligence. A mere error in judgment, a mistake upon a debateable point of law, or in the construction of a difficult statute, is not such negligence as renders an attorney liable to his client for a loss sustained in consequence of such error or mistake. Regard must be had to all the circumstances of the transaction, and if they are such as to show gross or culpable neglect on the part of the attorney he will be responsible.⁴

In a California case it appeared that the defendant, an attorney, had conducted the plaintiff's cause honestly, to the best of his knowledge and ability, but that he had presented a motion for a new trial without a certified statement, in consequence of which the plaintiff's appeal was dismissed. The lower court held that the plaintiff had suffered no injury from the dismissal, because, as the law then stood, he could have taken nothing by his appeal, although under subsequent decisions of the same term he might have appealed effectually. In the appellate court it was held that the facts being ascertained, the question of negligence or want of skill was one of law, and the court

¹ *Wilson v. Russ*, 20 Me. 421; *Goodman v. Walker*, 30 Ala. N. S. 482; *Cox v. Sullivan*, 7 Ga. 144; *Bakie v. Chandlers*, 3 Camp. 17; *Purves v. Randell*, 12 Clark & F. 91; *Godfroy v. Dalton*, 6 Bing. 468; *Gambert v. Hart*, 44 Cal. 542.

² *Pennington v. Yell*, 6 Eng. 212.

³ *Shillcock v. Passman*, 7 Car. & P. 289; *Purves v. Randell*, 12 Clark & F. 91; *Lamphier v. Phipos*, 8 Car. & P. 475; *Fish v. Kelly*, 17 Com. B. N. S. 194; *Hart v. Frame*, 6 Clark & F. 193; 3 Jur. 547. See *Mercer v. King*, 1 Fost. & F. 490; *Parker v. Rolls*, 4 Com. B. 691; *Lewis v. Collard*, 14 Com. B. 208; 2 Com. Law Rep. 1345; 23 Law J. Com. P. 32; *Watts v. Porter*, 3 El. & B. 743; 2 Com. Law Rep. 1553; *Potts v. Sparrow*, 6 Car. & P. 749.

⁴ *Crosbie v. Murphy*, 8 I. C. L. R. 301. See *Swannell v. Ellis*, 8 Moore, 340; 1 Bing. 347.

below having decided in favor of the defendant, a new trial was ordered.¹

§ 294. Neglect of attorney is neglect of client as to third parties.—The neglect of an attorney is usually treated, so far as the other side is concerned, as the neglect of the client, and generally no mistake, inadvertence, or neglect attributable to the attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client.² In New York, however, a default and judgment thereon was set aside, on showing that proceedings were utterly neglected by the attorney, on the ground that an attorney ought not to be permitted to inflict unbounded damage on his client, there being no other redress except an action for negligence.³ But usually the rule is, that where an attorney is employed in a cause, the fact that his client is not in fault, and that judgment goes against him through the laches or bad faith of the attorney, will furnish no ground of relief. The acts and omissions of the attorney in such a case are those of the client. The attorney is the agent of the party employing him, and in court stands in his stead.⁴ This is the rule, unless there be some fraudulent combination or collusion between the attorney and the other side.⁵

§ 295. The usual remedy.—The usual remedy of the client against an attorney for inattention, negligence, or unskillfulness, is by action. An attorney is liable in an action at law for blunders and omissions in the conduct of the formal proceedings, whereby his client is prejudiced;⁶ but in cases of negligence he

¹ *Gambert v. Hart*, 44 Cal. 542.

² *Freeman on Judgments*, sec. 112; *Austin v. Nelson*, 11 Mo. 192; *Kerby v. Chadwell*, 10 Mo. 392; *Merritt v. Putnam*, 7 Minn. 493; *People v. Harris*, 23 Cal. 127; *Babcock v. Brown*, 25 Vt. 550; *Spaulding v. Thompson*, 12 Ind. 477; *Davidson v. Heffron*, 31 *Ibid.* 687.

³ *Elston v. Schelling*, 7 Robt. 74; *Meacham v. Dudley*, 6 Wend. 514.

⁴ *Gehrke v. Jodd*, 59 Mo. 522; *Field v. Matson*, 8 Mo. 686; *Kirby v. Chadwell*, 10 Mo. 392; *Austin v. Nelson*, 11 Mo. 192; *Ridgley v. Steamer Reindeer*, 27 Mo. 442; *Biebinger v. Taylor*, 64 Mo. 63. See *Bradford v. Coit*, 77 N. C. 72.

⁵ *Matthis v. Town*, 62 Mo. 504.

⁶ *Evans v. Watrous*, 2 Port. 205; *Benton v. Craig*, 2 Miss. 198; *Anon.* 1 Wend. 108; *Gaillard v. Smart*, 6 Cowen, 385; *Cox v. Livingston*, 2 Watts & S. 103; *Fitch v. Scott*, 3 How. (Miss.) 314; *Stephenson v. White*, 2 Wash. (Va.) 203; *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 2 D. Chip. 117.

is liable only to the extent of the injury his client has received.¹

The usual action against an attorney for negligence or unskillfulness has been action on the case.² In gross cases, however, of neglect or misconduct, the courts have interfered summarily; especially where the transaction has been tainted with fraud,³ or the attorney has been paid beforehand for what he has omitted to do.⁴ When the summary jurisdiction is resorted to, the attorney may be proceeded against by attachment⁵ by an order to reimburse the client,⁶ or to impose costs on him;⁷ but without some proof of fraud the courts generally prefer to leave the client to his regular remedy by action.⁸ Negligence may, however, as we shall presently see, afford answer to an attorney's claim for remuneration, if the client has derived no benefit whatever from the services, but not otherwise.⁹

An action lies against an attorney for neglecting to charge a person in execution at his client's suit according to a rule of court, even though the omission was rather from want of judgment than negligence. In such cases the question, what is reasonable skill, is for the jury.¹⁰ If an attorney assumes the responsibility of dismissing a suit, on receiving in payment claims against other parties, he renders himself liable for the amount of the claim on which the action was founded, unless he proves that a judgment on that claim would have been of no value.¹¹ An attorney is also liable for receiving payment of a claim in depreciated money.¹² An attorney cannot, for want of funds, abandon a cause which he has undertaken, without rea-

¹ *Suydam v. Vance*, 2 McLean 99; *Hogg v. Martin*, Riley 156; *Grayson v. Wilkinson*, 13 Miss. 265; *Eccles v. Stephenson*, 3 Bibb, 517.

² *Russell v. Palmer*, 2 Wils. 235; *Pitt v. Yalden*, 4 Burr. 2061.

³ *In re Jones*, 1 Chit. 651; *Wendell v. Van Rensselaer*, 1 John. Ch. 344; 4 *Ibid.* 118; 5 Watts, 303. See *ante*, Chapter IV.

⁴ *Garner v. Lawson*, 1 Barn. 101; *Rex v. Jew, Sayers*, 50.

⁵ *Collins v. Griffin, Barnes*, 37; *Floyd v. Nangle*, 3 Atk. 568.

⁶ *Rex v. Bennett, Sayers*, 169.

⁷ *Rex v. Tew, Sayers*, 50; *Rex v. Bennett, Sayers*, 169; *De Rouffigny v. Peale*, 3 Taunt. 484; *Brown v. Dawson*, 2 Hogg, 76.

⁸ *Barker v. Butler*, 2 W. Black. 780; *Frankland v. Lucas*, 4 Sim. 586.

⁹ *Black v. Creighton*, 2 Molloy, 652; *Piggott v. Williams*, 6 Mod. 95; *Brazier v. Bryant*, 2 Dowl. 600; *Runyan v. Nichols*, 11 Johns. 547; *Gleason v. Clark*, 9 Cowen, 57; *Hopping v. Quinn*, 12 Wend. 517.

¹⁰ *Russell v. Palmer*, 2 Wils. 325.

¹¹ *Coopwood v. Baldwin*, 25 Miss. 129.

¹² *Trumbull v. Nicholson*, 27 Ill. 149.

sonable notice to his client. What is reasonable notice is also a question for the jury.¹

In actions against attorneys for negligence or want of skill in the management of suits, when the facts are ascertained, the question of negligence or want of skill is, as a rule, a question for the jury under the direction of the court.² But in California a contrary doctrine prevails, and it has been held in that State that it is a question of law for the court.³

The amount of damages in all cases of negligence of the attorney is also a question for the jury,⁴ and so is the question as to what is reasonable care and skill. The judge is bound to define it. The testimony of experts may be allowed.⁵

§ 296. Legal and equitable actions.—When an action lies at common law, a client cannot obtain relief in equity for damages sustained by the attorney's negligence. In cases of fraud, equity may take cognizance, but not in cases of mere negligence.⁶ If, however, the solicitor merges himself into a mere agent or trustee, then he is equitably responsible for negligence in investing in inadequate securities. In gross cases of neglect or misconduct, the courts will interfere summarily, as where the transaction is tainted with fraud, or the attorney has been expressly paid beforehand for what he has omitted to do.⁷ And when the summary jurisdiction is resorted to, the attorney may be pro-

¹ *Hoby v. Built*, 3 Barn. & Adol. 350.

² *Rhines v. Evans*, 66 Pa. 192; *Pennington v. Yell*, 6 Eng. 212; *Hunter v. Caldwell*, 10 Q. B. 69; *Reece v. Rigley*, 4 B. & A. 202; *Walpole v. Carlisle*, 32 Ind. 415.

³ *Gambert v. Hart*, 44 Cal. 542. As to delay in bringing suit, see *Walpole v. Carlisle*, 32 Ind. 415; *Rhines v. Evans*, 66 Pa. 192; *Campbell's Adm'r v. Boggs*, 12 Wright, 524; *Downey v. Garard*, 12 Harris, 52.

⁴ *Russell v. Palmer*, 2 Wils. 325; *Jones v. Lewis*, 9 Dowl. 143; *Hogg v. Martin*, Riley, 156; *Evans v. Watrous*, 2 Port. 205; *Crooker v. Hutchinson*, 2 Chit. 117.

⁵ *Parker v. Rolls*, 14 Com. B. 691; *Pennington v. Yell*, 6 Eng. 212.

In regard to negligence in not avoiding the bar of the Statute of Limitations by commencing suit, a considerable duty devolves upon the creditor himself. He should instruct his counsel to sue in time. (*R. R. Co. v. Byers*, 8 Casey, 22; *Hopping v. Quinn*, 12 Wend. 517; *Smedes v. Elmendorf*, 3 Johns. 185; *Stevens v. Walker*, 55 Ill. 151.)

⁶ *Wharton on Agency*, sec. 605; *British Mutual Investment Co. v. Cobbold*, Law R. 19 Eq. 627; *Brooks v. Day*, 2 Dick. 572; *Blair v. Bromley*, 5 Hare, 512; 2 Phill. 354; *Mare v. Lewis*, Ir. Law Rep. 4 Eq. 235. Some *dicta* to the contrary are to be found in *Floyd v. Nangle*, 3 Atk. 568; — *v. Jolland*, 8 Ves. 72; *Dixon v. Williamson*, 4 De Gex & J. 208; *Chapman v. Chapman*, Law R. 9 Eq. 276.

⁷ *In re Jones*, 1 Chit. 651; *In re Hill*, Law R. 3 Q. B. 543; *Garner v. Lawson*, 1 Barnard, 101; *Rex v. Tew*, Sayers, 50.

ceeded against by attachment,¹ or by an order to reimburse the client;² but without some proof of fraud the courts will generally leave the client to his remedy by action.³

§ 297. Liability of attorneys to actions for negligence in conduct of causes.—If an attorney, in conducting the legal concerns of his client, is guilty of negligence or misbehavior, or be deficient in integrity, diligence and skill, in consequence of which an injury accrues to his client, he is liable in an action for the damages which his client has sustained. ¶ It is not, however, for every error or mistake that an attorney is liable, but only such as arise from *lata culpa crassa* or *negligentia*.⁴

An attorney is not liable for the consequence of a mistake in a point of law upon which a reasonable doubt may be entertained;⁵ nor is he to lose his bill, on account of any error in the execution of his duty which a cautious man might fall into; but if the charges contained in his bill are brought upon his client by his misadventure, he cannot recover them.⁶

If an attorney brings an action within a court of limited jurisdiction, knowing that the circumstances which gave the right of action arose out of the jurisdiction of such court, he is guilty of negligence, and liable in damages.⁷ So if he goes to trial without a material witness and a nonsuit is the result, the jury may decide whether the attorney used reasonable care in conducting the trial, and a verdict that he did not 'do so will not be disturbed.⁸ So the question of negligence in not complying with the practice of the court is a question of fact for the jury under the instructions as to the law.⁹ An attorney is liable for the

¹ *Collins v. Griffin*, Barnes, 37; *Floyd v. Nangle*, 3 Atk. 568.

² *Rex v. Bennett*, Sayers, 169.

³ *Barker v. Butler*, 2 W. Blackst. 780; *Frankland v. Lucas*, 4 Sim. 586. As to costs, see *Rex v. Tew*, Sayers, 50; *Rex v. Bennett*, *Ibid.* 169; *De Rouigny v. Peale*, 3 Taunt. 484; *Brown v. Dawson*, 2 Hogan, 76.

⁴ 3 Blackst. Com. 165.

⁵ *Kemp v. Burt*, 1 N. & M. 262; 4 Barn. & Adol. 424.

⁶ *Montrion v. Jefferys*, 2 Car. & P. 113; R. & M. 317.

⁷ *Williams v. Gibbs*, 6 N. & M. 788; 2 Har. & W. 241; *Cox v. Leech*, 1 Com. B. N. S. 617; 3 Jur. N. S. 442; 26 Law J. C. P. 125. See *Lee v. Dixon*, 3 Fost. & F. 744.

⁸ *Reece v. Rigby*, 4 B. & A. 202. See as to filing writs, *Hunter v. Caldwell*, 10 Q. B. 69; 11 Jur. 770; 16 Law J. Q. B. 274; 12 Jur. 285; 10 Q. B. 83.

⁹ *Ibid.*

neglect of a process-server to make an indorsement of service.¹

In England, an attorney in a cause is not answerable for the absence, neglect, or want of attention of the counsel engaged in it; but when without reasonable excuse he neglects to instruct counsel, or to appear at the trial, and in consequence the plaintiff is nonsuited, he will at least be compelled to pay the costs of the trial out of his own pocket.² No action lies against an attorney for negligence in the conduct of a cause at *nisi prius* upon matters within the province of counsel, or for omitting to move for a new trial without instruction so to do.³

In actions for negligence in allowing judgment to go by default, the negligence being proved, the burden is on the attorney to show if he can that the plaintiff had no defense to the action, and it is not for the plaintiff to begin by showing that he had a good defense, and so had been damnified by the default.⁴

Prima facie, it is the duty of an attorney who has recovered a judgment for a lien to issue an execution, and especially if desired to do so. But to maintain an action against him for failure to issue it, he deeming it not desirable to do so, there must be some evidence that it was desirable and for the benefit of the client, as failure to make due inquiries as to the financial condition of the debtor. In such case, the attorney is liable for the amount, if any, which the jury think execution would have realized for the client, had it been properly issued.⁵

If an attorney negligently commence or defend an action or suit without authority, he is liable for the consequences to the principal, and may be made to pay the costs.⁶ And so, if in the conduct of the proceedings he takes any step out of the ordinary routine of his professional duty, without or contrary to instructions. But, attorneys being invested with liberty of action, are not generally amenable for acting in such matters as come

¹ *Curlew v. Broad*, 1 H. & C. 322; 31 Law J. Ex. 473; 10 Week. R. 797.

² *Lowry v. Guilford*, 5 Car. & P. 234; *Townley v. Jones*, 8 Com. B. N. S. 289; *Hawkins v. Harwood*, 4 Ex. 503; 7 Dowl. & L. 181; 19 L. T. Ex. 33; *De Rouigny v. Peale*, 3 Taunt. 484.

³ *Fray v. Foster*, 1 Fost. & F. 681.

⁴ *Godefroy v. Jay*, 7 Bing. 413; 5 Moore & P. 284.

⁵ *Harrington v. Binns*, 3 Fost. & F. 942.

⁶ *Ex parte Hollington*, 29 Law T. N. S. 502; *Baker v. Loader*, 42 Law J. Ch. 113; *Anon.* 1 Salk. 88; *Hubbard v. Phillips*, 13 Mees. & W. 702; 2 Dowl. & L. 707.

within their legitimate province, though contrary to the instructions of the client.¹

Generally, in America, an attorney is not relieved from liability by his own employment of other counsel. If counsel, however, is employed by the client himself, or by the attorney with the knowledge and acquiescence of the client, it ought at least to be considered in mitigation of damages.² An attorney cannot recover of his client fees of counsel associated with him, without proving the client's request to employ counsel, or the payment by him of such fees, with the client's sanction.³

The question of negligence, whether it consists in improper conduct, or in a mistake as to the law, is one of fact for the jury to determine, under proper directions by the court. It is the province of the judge to inform the jury for what species or degree of negligence an attorney is properly answerable, and what duty in the case before them was cast upon him, either by the statute or the practice of the courts; but having done this, it is right to leave them to say, considering all the circumstances and the evidence of practitioners, whether, in the first place, the attorney has performed his duty—and in the second, in case of non-performance, whether the neglect was of that sort or degree which was venal and culpable in the sense of not sustaining or sustaining the action.⁴

In case the facts are undisputed, the court can determine, as matter of law, whether, in view of authorities attainable by proper research, any doubt in regard to the law is reasonable. So it is proper for the court, where the question of negligence arose in the misconstruction of a statute, to express to the jury an opinion that the interpretation of the statute was doubtful.⁵ While the burden of proving negligence is generally upon him who alleges it, it may be shifted upon the opposite party. Thus, where an attorney is employed, but does nothing, he is bound to justify, by showing, if he can, that there was no defense to the

¹ *Rolfe v. Rogers*, 4 Taunt. 191; *Cox v. Livingston*, 2 Watts & S. 103; *Pike v. Emerson*, 5 N. H. 393; *Alton v. Gilmanton*, 2 Ibid. 520.

² *Smallwood v. Norton*, 20 Me. 33.

³ *Cook v. Ritter*, 4 E. D. Smith, 253; *Matter of Bleakley*, 5 Paige, 311.

⁴ *Hunter v. Caldwell*, 10 Q. B. 69; *Reece v. Rigby*, 4 Barn. & Ald. 202; *Hogg v. Martine*, Riley, 156; *Parker v. Rolls*, 14 Com. B. 691; *Pennington v. Yell*, 6 Eng. 212.

⁵ *Bowman v. Tallman*, 2 Robt. 385; *Bulmer v. Gilman*, 4 Mau. & G. 108, 123.

action. If diligence would have been ineffectual, the defendant must show it.¹

It is the duty of the attorney in the conduct of a cause to pursue that course which will entail the least costs on his client, so long as such a course is equally beneficial in other respects.² An attorney is liable for failing to sue for a sufficient amount, as for \$12 on a debt of \$1200. If he undertakes to supervise writs which it is not his strict duty to supervise, he is liable for negligence and want of skill in so doing,³ and he is liable for omitting to sue one of the parties to a note placed in his hands for collection; but if he sued one of the makers of the note in due course of law, and recovered a judgment which found sufficient property to pay the debt, and the plaintiff by his own act surrendered and vacated the judgment, it is a good defense.⁴

If the attorney, as a general rule, disobeys the lawful instructions of his client and a loss ensues, he is responsible. But he is not bound to proceed in a cause unless his fees are tendered or secured to him, if he makes a demand to that effect, and gives the client a reasonable notice of his intention to abandon the cause unless they are paid or secured to him in some way.⁵

Having instituted proceedings, the attorney must prosecute them with diligence.⁶ A nonsuit is not itself evidence of negligence;⁷ but the attorney is liable for improperly dismissing the client's action.⁸ The English barrister may, in his discretion, consent to a nonsuit.⁹

¹ *Godefroy v. Jay*, 7 Bing. 413; *Swannel v. Ellis*, 1 *Ibid.* 347; *Bourne v. Diggles*, 2 Chit. 311.

² *Lee v. Dixon*, 3 Fost. & F. 744.

³ *Varnum v. Martin*, 15 Pick. 440; *Walker v. Goodman*, 21 Ala. N. S. 647.

⁴ *Ransom v. Cothran*, 6 Smedes & M. 167. See *Williams v. Reed*, 3 Mason, 405.

⁵ *Gilbert v. Williams*, 8 Mass. 51; *Cox v. Livingston*, 2 Watts & S. 103; *Gleason v. Clark*, 9 Cowen, 57; *Castro v. Bennett*, 2 Johns. 296; *Rowson v. Earle*, Mood. & M. 538; *Wadsworth v. Marshall*, 2 Crompt. & J. 665; *Mordecai v. Solomon*, Sayers, 172; *Creswell v. Byron*, 14 Ves. 272; *Hoby v. Built*, 3 Barn. & Adol. 350; *Harris v. Osborn*, 4 Tyr. 445; 2 Crompt. & M. 629; *Anon.* 1 Sid. 31, pl. 8; *Love v. Hall*, 3 Yerg. 408; *Van Sandan v. Browne*, 9 Bing. 402; *Heslop v. Metcalfe*, 8 Sim. 622.

⁶ *Fitch v. Scott*, 3 How. (Miss.) 314; *Ridley v. Tiplady*, 20 Beav. 44; *Frankland v. Cole*, 2 Crompt. & J. 590.

⁷ *Gleason v. Clark*, 9 Cowen, 57; *Gaillard v. Smart*, 6 *Ibid.* 385.

⁸ *Evans v. Watrous*, 2 Port. 205.

⁹ *Lynch v. Cowell*, 12 L. T. N. S. 548; *Chown v. Parrott*, 14 Com. B. N. S. 74; *Swinfen v. Chelmsford*, 5 Hurl. & N. 890; *Swinfen v. Swinfen*, 1 Com. B. 364, 400.

§ 298. Position of burden of proof in cases of negligence.—Special negligence being alleged, the client must state and prove the negligent act; or, at least, state and prove circumstances from which negligence is implied by necessary legal inference.¹ But when negligence has been proved, in consequence of which judgment has gone against the client, it is not incumbent on the client to show that but for the negligence he could have succeeded in the action. It is for the solicitor to show that the client has not been injured by it.²

So, under special circumstances, it has been held that the burden of proof is upon an attorney, regularly employed to conduct a cause, to show that his client has not been injured by his negligence; as where one was sued for negligence in allowing a judgment to go by default in an action which the plaintiff had retained him to defend, the negligence being proved, it was decided that it was for the attorney to defend himself by showing that the plaintiff had no defense in that action, and not for the plaintiff to show that he had a good defense, and so had been injured.³

§ 299. Instances of negligence.—The following acts have been held to amount to negligence for which an attorney is liable:

Misdescription in the particulars of sale prepared for a sale under the authority of the Court of Chancery.⁴ Vendor's solicitor causing abortive expenses to be incurred by his client, and executing a conveyance, while the title deeds were, as he knew, in the hands of an adverse party.⁵ Allowing client to enter into unusual covenant without explaining to him the liability incurred.⁶ Solicitor of purchaser or intending lessee omitting to investigate the title as far as the conditions of sale will allow him.⁷ Omitting (in a case where counsel is employed) to lay before counsel the whole abstract received from the purchaser.⁸

¹ Wharton on Negligence, sec. 752; *Purvis v. Randel*, 12 Clark & F. 91.

² *Godefroy v. Jay*, 7 Bing. 413. But see *Harter v. Morris*, 18 Ohio St. 491.

³ *Godefroy v. Jay*, 7 Bing. 413.

⁴ *Taylor v. Garman*, 4 I. R. Eq. 550.

⁵ *Fotts v. Dutton*, 8 Beav. 493.

⁶ *Stannard v. Ullithorne*, 10 Bing. 491.

⁷ *Knights v. Quarles*, 2 Brod. & B. 102; *Allen v. Clark*, 1 N. R. 358.

⁸ *Treson v. Fearman*, 3 Barn. & C. 799.

Solicitor of intending mortgagee omitting to make the proper searches,¹ or to give the proper notices to secure priority of title.² But it is not the duty of the solicitor to ascertain the value of the subject of the mortgage; nor to warn the client against every possible folly, such as paying the money without first obtaining the security.³ He is liable for neglect in drawing up a decree,⁴ in neglecting to duly enter up a judgment,⁵ in neglecting to prevent the claim being barred by lapse of time, and to prepare for trial.⁶ So also, for negligence in subpœnaing the requisite witnesses, and in attending the trial at the appointed time;⁷ or the referee in case of a reference; or at any stage of the cause where the attorney's presence may be requisite;⁸ and so as to the preparation of evidence.⁹

It is held actionable negligence to prosecute an action too soon,¹⁰ or to delay bringing an action until it is too late to be available and the claim is lost.¹¹ So if an attorney disobeys the lawful instructions of his client and a loss ensues, he is responsible.¹² He is liable for improperly dismissing his client's suit;¹³ but not for omitting to defend a suit if he be not instructed in the defense.¹⁴ He is liable for omitting to insert clearly, neces-

¹ *Cooper v. Stephenson*, 21 Law J. N. S. Q. B. 292.

² *Watts v. Porter*, 3 El. & B. 743; *Clark v. Marshall*, 34 Mo. 429; *Gore v. Brazier*, 3 Mass. 543; *Sprague v. Baker*, 17 Mass. 586.

³ *Hayne v. Rhodes*, 8 Ad. & E. N. S. 342; *Brumbridge v. Massey*, 28 Law J. N. S. Ex. 59.

⁴ *Wharton on Agency*, sec. 598; *In re Bolton*, 9 Beav. 272; *In re Spencer*, 18 Week. R. Ch. 240.

⁵ *Flower v. Bolingbroke*, 1 Strange, 639; *Fitch v. Scott*, 3 How. (Miss.) 314; *Hogg v. Martin*, Riley, 156; *Cox v. Livingston*, 2 Watts & S. 103.

⁶ *Godefroy v. Jay*, 7 Bing. 413; *Rouffigny v. Peale*, 3 Taunt. 484; *Lowry v. Guildford*, 5 Car. & P. 234.

⁷ *Reece v. Rigby*, 4 Barn. & Ald. 202; *Price v. Bullen*, 3 Law J. K. B. 39; *Nash v. Swinburne*, 3 M. & G. 630; *Rouffigny v. Peale*, *supra*, 4 Scott N. S. 326.

⁸ *Swannel v. Ellis*, 1 Bing. 347; *Atcheson v. Madock*, Peake, 163; *Dauntley v. Hyde*, 6 Jur. 163.

⁹ *Long v. Orsi*, 18 Com. B. 610.

¹⁰ *Hopping v. Quinn*, 12 Wend. 517; *Long v. Orsi*, 18 Com. B. 619; *Thwaites v. Mackenzie*, 3 Car. & P. 341.

¹¹ *Smedes v. Elmendorf*, 3 Johns. 185; *Walpole v. Carlisle*, 32 Ind. 415; *Rhines v. Evans*, 66 Pa. 192; *Fitch v. Scott*, 4 Miss. 314.

¹² *Gilbert v. Williams*, 8 Mass. 51; *Armstrong v. Craig*, 18 Barb. 387; *Cox v. Livingston*, 2 Watts & S. 103.

¹³ *Evans v. Watrous*, 2 Port. 205.

¹⁴ *Boston v. Craig*, 2 Mo. 198.

sary words in a pleading,¹ and for negligently performing acts which do not come within the strict line of his duty, if he undertakes to perform them,² as preparing a writ of attachment or recording a mortgage,³ when not a part of his duty.

The client must in some way be injured by his attorney's negligence, or he cannot maintain an action even for nominal damages.⁴ Whether given facts amount to actionable negligence is held in California to be a question of law for the court.⁵ But in nearly every other locality it is for the jury under the direction of the court.⁶ The attorney is also liable for the consequences of ignorance or non-observance, of the rules of practice of the court in which he proceeds.⁷ For the want of care in the preparation of causes for trial, or of attendance thereon with his witnesses;⁸ and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; as, for instance, an English attorney neglecting to retain counsel;⁹ to deliver a brief;¹⁰ or to attend the trial himself or by one of his clerks so as to properly instruct counsel;¹¹ to attend an arbitration where counsel was not retained;¹² neglecting to inform client that if he proceeded in an action without the consent of the creditors he would be liable for the costs;¹³ abandoning a case without reasonable notice to the client, although not supplied with funds;¹⁴ neglecting,

¹ *Varnum v. Martin*, 15 Pick. 440.

² *Walker v. Goodman*, 21 Ala. N. S. 647.

³ *Miller v. Wilson*, 24 Pa. 114.

⁴ *Harter v. Morris*, 18 Ohio St. 492; *Suydam v. Vance*, 2 McLean 99; *Grayson v. Wilkinson*, 13 Miss. 268.

⁵ *Gambert v. Hart*, 44 Cal. 542.

⁶ *Rhines v. Evans*, 66 Pa. 192; *Reece v. Rigby*, 4 Barn. & Adol. 202; *Pennington v. Yell*, 11 Ark. 212; *Evans v. Watrous*, 2 Port. 205; *Hogg v. Martin*, Riley, 156; *Goodman v. Walker*, 30 Ala. N. S. 482.

⁷ *Godefroy v. Dalton*, 6 Bing. 468; *Cox v. Leach*, 1 Com. B. N. S. 617; *Hunter v. Caldwell*, 10 Ad. & E. N. S. 69; *Frankland v. Cole*, 2 Cromp. & J. 590; *Huntley v. Bulwer*, 6 Bing. N. C. 511; *Stokes v. Trumper*, 2 Kay & J. 232; *Dearborn v. Dearborn*, 15 Mass. 316.

⁸ *Godefroy v. Dalton*, 6 Bing. 468; *Reece v. Rigby*, 4 Barn. & Ald. 202.

⁹ *Rex v. Tew*, Sayers, 50.

¹⁰ *De Rouigny v. Peale*, 3 Taunt. 484.

¹¹ *Hawkins v. Harwood*, 4 Ex. 503; *De Rouigny v. Peale*, 3 Taunt. 484.

¹² *Swannel v. Ellis*, 1 Bing. 347.

¹³ *Allison v. Rayner*, 7 Barn. & C. 441.

¹⁴ *Hoby v. Built*, 3 Barn. & Ald. 349.

while suing upon French bills of exchange, to ascertain whether they had been indorsed according to French law.¹

An attorney at law is responsible for losses caused by his disregard, in bringing a suit for his client, of a rule of law which was well and clearly defined both in the text-books and the reports, and which had existed and been published long enough to justify the belief that it was known to the profession. An attorney's receipt for a claim placed in his hands for collection is admissible evidence against him in an action on the case for negligence and unskillfulness, to prove the relation of attorney and client; and the record of the suit on the claim is also admissible against him to prove the final determination of that suit, although it was conducted by him in the name of another attorney.²

An attorney bringing an action for a client within a limited jurisdiction, on a cause of action arising out of such jurisdiction, is liable for negligence.³ An attorney, before issuing a writ in a court of peculiar constitution, is bound to ascertain that the court has machinery to fulfill the object of the action.⁴

An attorney is bound to sue out the proper process against bail,⁵ and against an officer for taking insufficient bail, or not delivering over the bail-bond.⁶ He is bound to deliver an execution to an officer in season to preserve attachment,⁷ but not to attend in person to the levy of an execution,⁸ nor search for property,⁹ nor to convey to a sheriff his client's directions for seizing goods on an execution.¹⁰

When an attorney takes the responsibility of dismissing a suit on receiving in payment claims on other parties, he renders himself liable for the amount of the claim on which the action dismissed was founded, unless he proves that a judgment on that claim would have been of no value.¹¹ Proceedings on motion against an attorney for money collected are no bar to a recovery

¹ *Long v. Orsi*, 18 Conn. B. 610.

² *Goodman v. Walker*, 30 Ala. 482.

³ *Williams v. Gibbs*, 6 Nev. & M. 788.

⁴ *Cox v. Leech*, 38 Eng. L. & Eq. 271. See *Long v. Orsi*, 37 Eng. L. & Eq. 253.

⁵ *Dearborn v. Dearborn*, 15 Mass. 316; 6 Eng. 312.

⁶ *Simmons v. Bradford*, 15 Mass. 82; *Crooker v. Hutchinson*, 1 Vt. 73.

⁷ *Phillips v. Bridge*, 11 Mass. 242.

⁸ *Williams v. Reed*, 3 Mason, 405; *Pennington v. Yell*, 6 Eng. 212.

⁹ *Ibid.*

¹⁰ *Ford v. Williams*, 3 Kern. 577.

¹¹ *Coopwood v. Baldwin*, 25 Miss. 129.

in an action on the case for damages.¹ An attorney employed to examine a land-title cannot set up in defense to an action for damages for his negligence in overlooking a lien on the land, that such lien was erroneous or of doubtful validity.² Attorneys are liable for appearing and defending without authority, especially where they do it unskillfully.³ An attorney employed to record a mortgage, but who neglected to do so until after other subsequent incumbrances have been recorded, is liable immediately to the mortgagee for all the damages which are likely to be sustained by his default.⁴

In a suit against an attorney for neglecting to defend an action, his declarations made to the court, when the action was called on for trial, that he had no defense to make, because his client though requested to instruct him in a defense had not done so, are admissible in evidence not to prove the truth of the facts stated, but the circumstances which occurred at the time of the alleged negligence.⁵

When an attorney is sued by his client for negligence and unskillfulness, he cannot set up champerty in the contract as a defense,⁶ nor that he consulted a distinguished attorney respecting the proper course to be pursued by him, or that the arrangement made by him was, in the opinion of the witness, the best that could be made for his client's interest.⁷

It has been held actionable negligence for an attorney to bring his action in a court which has no jurisdiction,⁸ or to lay the venue in the wrong county,⁹ or to proceed on a wrong section of a statute which gives the remedy;¹⁰ but he is not liable because the statutory proceeding was in law ineffectual to accomplish the purpose for which he was retained, or was made so by

¹ *Coopwood v. Baldwin*, 25 Miss. 129.

² *Gilman v. Hovey*, 26 Mo. 280.

³ *O'Hara v. Brophy*, 24 How. Pr. 379.

⁴ *Miller v. Wilson*, 24 Pa. 114.

⁵ *Salisbury v. Gourgass*, 10 Met. 442.

⁶ *Goodman v. Walker*, 30 Ala. 482.

⁷ *Ibid.*

In an action against an attorney for negligence, as such, the fact that the client continued to employ him after knowledge of the negligent conduct is admissible evidence on the question of damages. (*Derrickson v. Cady*, 7 Barr, 27.)

⁸ *Williams v. Gibbs*, 5 Ad. & E. 208.

⁹ *Kemp v. Burt*, 4 Barn. & Adol. 424.

¹⁰ *Hart v. Frame*, 6 Clark & F. 193.

the decision of the court.¹ He is liable sometimes for prosecuting too soon, as on a note before the last day of grace has expired,² or before the requisite notices and preliminary proceedings have been disposed of,³ or before sufficient information is had to ascertain whether there is a right of action.⁴ He is also sometimes responsible for undue delay, as where the debt is lost by reason of the insolvency of the debtor during the delay.⁵

An attorney is liable for allowing judgment to go by default without his client's consent; but not for omitting to defend, unless he has been instructed in the defense.⁶ He is not liable for not filing pleas merely for delay, although instructed to do so; and he is liable only for nominal damages, if at all, if he can show that the defense he was employed to make was not good.⁷

An attorney who neglects to take proper precautions in matters affecting his client's interests, and within his knowledge, is liable, as in cases of the death, marriage, or insolvency of the opposite parties;⁸ and he should proceed to set aside all irregular proceedings prejudicial to his client.⁹ It is also his duty to see that recognizances entered into by a receiver in an action are in proper form.¹⁰

As a retainer to prosecute a suit authorizes the attorney to conduct it to final judgment and execution,¹¹ he is liable for not

¹ *Bowman v. Tallman*, 2 Robt. 385.

² *Hopping v. Quinn*, 12 Wend. 517.

³ *Long v. Orsi*, 18 Com. B. 619; *Hunter v. Caldwell*, 10 Q. B. 69.

⁴ *Thwaites v. Mackenzie*, 3 Car. & P. 341; *Gill v. Lougher*, 1 Crompt. & J. 170; *Montgomery v. Devereaux*, 7 C. C. & F. 188.

⁵ *Smedes v. Elmendorf*, 3 Johns. 185. See *Brougher v. Scobey*, 23 Ind. 583; *Wilson v. Coffin*, 2 Cush. 316; *Varnum v. Martin*, 15 Pick. 440; *Dearborn v. Dearborn*, 15 Mass. 315; *Picketts v. Pearsons*, 17 Vt. 470; *Suydam v. Vance*, 2 McLean, 99; *Braine v. Spaulding*, 52 Pa. 247; *Wakeman v. Gowdy*, 10 Bosw. 208.

⁶ *Godefroy v. Jay*, 7 Bing. 413; *People v. Sanborn*, 1 Scam. 123; *Benton v. Craig*, 2 Mo. 198. See *Grayson v. Wilkinson*, 5 Smedes & M. 268; *Salisbury v. Gourgas*, 10 Met. 442.

⁷ *Johnson v. Alston*, 1 Camp. 176; *Pierce v. Blake*, 2 Salk. 515; *Vincent v. Groome*, 1 Chit. 182; *Anon.* 1 Wend. 108; *Gilbert v. Williams*, 8 Mass. 51; *Grayson v. Wilkinson*, 5 Smedes & M. 268; *Hastings v. Halleck*, 13 Cal. 203. See *Atcheson v. Madock*, Peake, 162.

⁸ *Stannard v. Ullithorne*, 10 Bing. 491; 4 Moore & S. 359; *Jacoud v. French*, 12 East, 317.

⁹ *Godefroy v. Jay*, 7 Bing. 413; *Smallwood v. Norton*, 20 Me. 83.

¹⁰ *Simmons v. Rose*, 31 Beav. 1.

¹¹ *Brackenbury v. Pell*, 12 East, 588; *Lawrence v. Harrison*, Style, 426.

duly entering up judgment,¹ or for not charging the defendant in execution.² Still an attorney is not bound to attend personally to the levy of an execution,³ nor to search for property.⁴

Besides, to maintain an action for negligence against an attorney for not issuing an execution, he considering it not advisable, there must be some evidence that it was for the benefit of the client to have it done, or that he made no inquiry as to the financial condition of the debtor. In such case the attorney is liable for any amount which the jury think execution would have secured for the client. If he doubts the expediency of proceeding, he should at once notify his client, and obtain specific instructions, one way or the other.⁵ Under somewhat similar qualifications, the attorney is also liable for not seasonably suing out *scire facias* against bail,⁶ but he is not bound to institute new collateral suits without special instructions.⁷ He has also been held liable for delaying to deliver an execution to the officer, whereby the right to issue an attachment is lost,⁸ and for not giving notice of the insufficiency of bail, if he knows it, whereby the debt is lost;⁹ but he is not bound to move for a new trial on questions of law, without special instructions.¹⁰

§ 300. Pleading and evidence in actions against attorneys for negligence—Form.—The plaintiff may sue in assumpsit or case for negligence. If the action be founded in fraud, case is the preferable form of action, it having been said that the Statute of Limitations might thereby be avoided.¹¹ But

¹ *Flower v. Bolingbroke*, 1 Strange, 639.

² *Russell v. Palmer*, 2 Wils. 325; *Russell v. Stewart*, 3 Burr. 1787; *Pitt v. Yalden*, 4 Ibid. 2060; *Lee v. Ayrton*, Peake, 119. But see *Laidler v. Elliott*, 3 Barn. & C. 738.

³ *Williams v. Reed*, 3 Mason, 405.

⁴ *Pennington v. Yell*, 6 Eng. 212; *Ray v. Birdseye*, 5 Denio, 619; S. C. 4 Hill, 158.

⁵ *Harrington v. Binns*, 3 Fost. & F. 942; *Dearborn v. Dearborn*, 15 Mass. 316.

⁶ *Dearborn v. Dearborn*, *supra*; *Crooker v. Hutchinson*, 1 Vt. 73. See *Simmons v. Bradford*, 15 Mass. 82.

⁷ *Pennington v. Yell*, 6 Eng. 212.

⁸ *Phillips v. Bridge*, 11 Mass. 246; *Pitt v. Yalden*, 4 Burr. 2060; *Russell v. Palmer*, 2 Wils. 325.

⁹ *McWilliams v. Hopkins*, 4 Rawle, 382; *Simmons v. Bradford*, 15 Mass. 82.

¹⁰ *Hastings v. Halleck*, 13 Cal. 203.

¹¹ *Russell v. Palmer*, 2 Wils. 328; *Pitt v. Yalden*, 4 Burr. 2060; *Knight v. Quarles*, 4 Moore, 332; *Swannell v. Ellis*, 1 Bing. 347; *Short v. McCarthy*, 3 Barn. & Ald. 626; *Brown v. Howard*, 2 Brod. & B. 73; 4 Moore, 508.

it appears that if the cause of action be the breach of duty arising from negligence, the Statute of Limitations is equally available in case as in assumpsit. In actions for negligence against an attorney the plaintiff must aver a cause of action, and prove it as averred.¹ For the breach of the implied contract of an attorney to investigate the title to real estate, in an action by the executor of the purchaser, it must be averred that the testator sustained some actual damage.² It is not necessary to allege that the party against whom the former action was depending was indebted, etc., but if the plaintiff unnecessarily set out the proceedings in which the defendant was retained, he should state them with accuracy.³ The declaration may be without any inducement, and may commence with a statement of the defendant's retainer, without stating a consideration.⁴ It is not necessary to state in the declaration of what court the defendant was an attorney, but if stated it must be proved, though the defendant put in his plea as such.⁵

It is generally sufficient to prove that the attorney has acted as an attorney of the court of which he is alleged to be an attorney. Of course it may also be proven by the rolls and records.⁶ Where the question is whether the defendant has been guilty of gross negligence, contrary to the known and usual practice, those who are conversant in the same kind of practice may be examined as witnesses on either side.⁷ If there have been express instructions, the same should be proven. Where the proceedings in a former action form the groundwork of the action against the attorney, such proceedings should be produced, or the necessary steps taken to give secondary evidence of them.⁸

In support of an action, for instance, for neglecting to have a witness at a trial where plaintiff was nonsuited, the plaintiff must prove by calling the witness, or otherwise, that such witness was necessary and material, and that his attendance might

¹ 1 Wm. Saund. a. n. a.

² 1 Chitty on Pleading, 12.

³ Lee v. Ayrton, Peake, 119; Brown v. Jacobs, 2 Esp. 726.

⁴ Bourne v. Diggles, 2 Chit. 311; Knight v. Quarles, 4 Moore, 532.

⁵ Green v. Jackson, Peake, 311; 2 Chit. 311; 2 Chitty on Pleading, 371.

⁶ Rex v. Crossley, 2 Esp. 576; Berryman v. Wise, 4 Durn. & E. 366; Stark on Evidence, 130; Green v. Jackson, Peake, 236.

⁷ Russell v. Palmer, 2 Wils. 328.

⁸ Parry v. Collis, 1 Esp. 399; Reece v. Rigby, 4 Barn. & Ald. 202.

have been procured, and that plaintiff was nonsuited.¹ And in an action for the loss of a debt, through defendant's negligence, plaintiff must establish the existence of such debt; and if he has obtained a judgment to recover it, that will be evidence of the debt, and he should prove the judgment by the judgment-roll, or an examined copy thereof. If the former defendant had been arrested on *mesne process*, and the action is against the defendant for negligence whereby the former defendant was superseded, besides proving the debt the writ should be produced, or an examined copy if it has been returned; and the actual time of commitment should be proved by the books of the prison; the grounds of the discharge will be shown by means of the supersedeas or order for the discharge.²

If the plaintiff has been evicted in consequence of a defect in title arising from the defendant's negligence, he should produce the deeds, and prove the execution of them and the payment of the money, and show that he has been evicted by proof of the judgment in ejectment, the execution of the writ of possession producing the writ, or an examined copy if it has been returned.³ In an action on the case against an attorney for negligence, in not duly moving to set aside the proceedings for defect of service, in consequence of which judgment had gone by default and final judgment had and execution issued thereon, it was held that the plaintiff was bound to prove that the judgment signed against him had been completed and the judgment-roll carried in, and such judgment proved by an examined copy.⁴

Proof of a person being an attorney may be shown by the production of the original roll signed by the party on his admission, together with proof of his signature as evidence of the identity of the party, or by an examined copy of the roll together with the admission; or the fact of a person of the same name being an attorney may be shown by the clerk's entry in his books; and the admission or some other proof, as for example, of practice as an attorney, will then be necessary to show that this person is the party in question.⁵

¹ *Reece v. Rigby*, 4 Barn. & Ald. 202.

² *Russell v. Palmer*, 2 Wils. 328; 2 Stark on Evidence, 134.

³ 2 Stark. Ev. 135.

⁴ *Godefroy v. Jay*, 1 Moore & P. 236.

⁵ *Rex v. Crossley*, 2 Esp. 526. See *Jones v. Stevens*, 11 Price, 251; *Pearce v. Whale*, 5 Barn. & C. 39; *Lewis v. Walter*, 3 Barn. & Cr. 138.

In an action for a libel on a plaintiff tending to injure his credit and reputation

In an action against an attorney for neglect in the management of a suit, it is held not necessary to aver that the plaintiff had paid or secured him a fee; an averment that the defendant undertook to prosecute the suit for a sum thereafter to be paid is sufficient.¹ But to render an attorney liable for a debt placed in his hands for collection, plaintiff must show that he had a valid claim, which has been impaired or lost through the attorney's misconduct or negligence.² It is sufficient *prima facie* proof that he was employed to show that he acted and was recognized on the records of the court acting as such.³ To charge an attorney with negligence in failing to set up a defense based upon facts communicated to him by his client, he must show by evidence the existence of such facts, and that they were susceptible of proof at the trial by the exercise of proper diligence on the part of the attorney.⁴

Evidence for defendant.—It is a sufficient answer to an action against an attorney for negligence, that the defendant's diligence would have been ineffectual; as if, for instance, in an action for negligence for not giving previous notice in a suit against excise officers for a seizure, that the seizure was lawful;⁵ or for suffering the defendant in a former suit to be superseded for want of proceeding to judgment in due time, that the plaintiff in a former suit was a married woman.⁶ It is, to state the rule generally, a sufficient answer to suits by clients, that the attorney has acted with reasonable skill and knowledge, and that the error, if any, was such a one as a skillful and cautious man might fall into.⁷ In actions by third parties against the attorney for acts done in conducting his client's business, (as in an ac-

in his profession and business of an attorney, and defamatory of him in his said profession and business, his being an attorney was proven by the book of admissions produced by the proper officer, and that he practiced as an attorney. Where defendant charged plaintiff with being a swindler, and threatened to have him struck off the roll of attorneys, the court considered the defendant's threat to be a distinct acknowledgment that the plaintiff was an attorney, and further proof was dispensed with. (*Berryman v. Wise*, 4 Durn. & E. 366.)

¹ *Eccles v. Stephenson*, 3 Bibb, 517.

² *Shiller v. Davidson*, 4 La. An. 171.

³ *Smallwood v. Norton*, 20 Me. 83.

⁴ *Hastings v. Halleck*, 13 Cal. 203.

⁵ *Aitcheson v. Madock*, Peake, 162; *Bourne v. Diggles*, 2 Chit. 311.

⁶ *Lee v. Ayrton*, Peake, 161.

⁷ *Montrion v. Jeffreys*, 1 Ryan & M. 320; *Pitt v. Yalden*, 4 Burr. 2061.

tion for trespass) it is a defense that the attorney has not gone beyond the strict line of his duty.¹ An attorney is not liable in cases of doubtful construction of a statute.²

Where an attorney was sued for damages for not suing one of the parties to a note placed in his hands for collection, it was a good plea in bar that the defendant sued one of the makers of the note, and recovered a judgment against him, and found a sufficient amount of unincumbered property to pay the debt, and that the plaintiff by his own act surrendered up and vacated the judgment.³ It is a good defense to an action for negligence in not instituting a suit to recover a debt, that the debt was not due the client but to another at the time.⁴ The fact that the plaintiff continued to employ the attorney after knowing of the negligent conduct, is evidence on the question of damages.⁵

§ 301. Sufficient count against attorney for negligence.

—In an action against attorneys at law for negligence and unskillfulness, a count is sufficient which alleges that they conducted the suit so negligently and unskillfully, "in not having a certain writ of attachment, affidavit, and declaration before then prepared by them in said action, prepared, drawn up, and filed, and made out according to the laws of said State and the rules of said court, that the said plaintiff, by the said neglect of, etc., was hindered and prevented from recovering judgment, etc., and was forced and compelled to release and dismiss the levy of said writ of attachment," or "by reason whereof the said plaintiff has been prevented from recovering her demand," etc. The following count has been held sufficient: "That the defendants through want of care and skill did dismiss the levy of a certain writ of attachment, before that time levied on the property of the defendant therein, did dismiss, relinquish,

¹ *Sedley v. Sutherland*, 3 Esp. 202; *Carrett v. Smallpage*, 9 East, 330; *Smith v. Gainsford*, 1 Rose, 148.

² *Bakie v. Chandless*, 3 Camp. 17.

³ *Ransom v. Cothrau*, 14 Miss. 167.

⁴ *Jackson v. Tilghman*, 1 Miles, 31.

⁵ *Derrickson v. Cady*, 7 Pa. 27. When a loss was sustained by a client in respect of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the Court of Chancery dismissed a bill for relief. (*Chapman v. Chapman*, 9 Law R. Eq. 276.)

and release all liens which had attached or accrued by virtue of said levy," and that by means of the unskillful management of the defendant the plaintiff lost her said demand, and the means of recovering and collecting the same.¹

When an attorney undertakes the collection of a debt it is his duty to sue out all processes, mesne and final, necessary to effect that object—not only the first execution, but such as may afterward become necessary; to pursue bail and those who may have become bound with the defendant in the progress of the suit either before or after judgment; but not to institute new collateral suits without special instructions, such as actions against the sheriff and clerk for failure of duty.²

§ 302. Negligence as a defense to an action for fees.—

It seems that if an attorney's services have proved entirely useless, there is no sort of question but that this may be shown in bar of an action for attorney's fees and of the whole action. The point that *any* competent evidence of negligence, ignorance, or want of skill is admissible as a defense to an action for professional services has not been so readily admitted. But the balance of authority seems rather in favor of the proposition.³ It is said that a declaration against an attorney for negligence must aver the payment of fees,⁴ but there are authorities which hold that it is not necessary to aver that the plaintiff has either

¹ Walker v. Goodman, 21 Ala. 647. See, also, Skillen v. Wallace, 36 Ind. 319.

² Pennington v. Yell, 6 Eng. 212. See Holmes v. Peck, 1 R. I. 242; Lewis v. Collord, 14 Com. B. 208. If a declaration state that the plaintiff, by advice of the defendant, an attorney, instituted a suit, and then and there employed the defendant to prosecute said suit to judgment, who, in consideration thereof, undertook to conduct the same to the best of his skill, yet he had neglected to file a declaration, whereby, &c.—it must be understood that the defendant's undertaking was for sufficient consideration. (Stephens v. White, 2 Wash. Va. 203.) Though a man is not bound to do an act for another without a reward, yet if he will voluntarily engage and enter upon the performance of it, he is liable for the consequences of his improper management, and cannot allege a want of consideration for his engagement. But if an attorney be sued for neglect of duty in not having filed a declaration, it should appear that he was engaged in the cause, in season to have filed it.

³ 2 Gr. Ev. sec. 143; Nixon v. Phelps, 3 Wils. 198; Judah v. Trustees, 23 Ind. 272; S. C. 16 Ind. 56. See Cristee v. Sawyer, 44 N. H. 298; Fenno v. English, 22 Ark. 170. Bowman v. Tallman, 40 How. Pr. 1.

⁴ See as requisites of such a declaration, Wilson v. Coffin, 2 Cush. 316; Holman v. King, 7 Met. 384.

paid or secured the attorney a fee,¹ and Lord Tenterden has said that in order to recover his bill of costs the attorney is bound "to show affirmatively that he has done all that he ought to have done."²

If a client sues an attorney for disregarding his instructions, he must show presumptively that he was damaged by the course of the attorney. Where a motion which a client desired to have made would probably not have been granted, and would have been likely to injure him, and it would not have been politic to put in certain evidence, the omission of which was complained of, the attorney recovered his bill.³

So an attorney at law may consent that a judgment obtained by his client upon the defendant's failure to answer be vacated, and the defendant allowed to answer, on a state of facts on which the court, if it pursued its customary practice, would make an order to that effect. Such a consent, and the failure of the defendant before judgment, are not alone sufficient evidence of negligence to defeat an action brought by the attorney for his services in the suit. But if he consents without the knowledge of his client, he is responsible for any loss which may necessarily result, and which would have been avoided if his client had been informed of the facts. Evidence may be admitted that at the time of vacating the default the debtor had property out of which the judgment could have been collected.⁴

It has been held in England that negligence in the conduct of a cause cannot be set up as a defense to an action on the attorney's bill, and that it is no defense that the defendant has derived no benefit from the suit, where the failure does not result wholly from the attorney's negligence, but partly from accident.⁵ But it is also held that an attorney cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience, and not with the design of imposing on his client.⁶ So

¹ *Eccles v. Stephenson*, 3 Bibb. 517.

² *Allison v. Rayner*, 7 Barn. & C. 441.

³ *Nave v. Baird*, 12 Ind. 318; *Bowman v. Tallman*, 2 Rob. 385. See *Porter v. Ruckman*, 38 N. Y. 210; *Headley v. Good*, 24 Tex. 232; *Chapman v. Van Tall*, 8 El. & Bl. 396.

⁴ *Clussman v. Merkel*, 3 Bosw. 402.

⁵ *Templer v. McLachlan*, 2 N. R. 136; *Dax v. Ward*, 1 Stark. 409.

⁶ *Hill v. Featherstonhaugh*, 7 Bing. 569; 5 Moore & P. 541.

the jury may discard an item of work entirely useless; though upon an item partly useless, or in respect of which there has been any negligence, the client's remedy is only by a cross action.¹ And it is held that if an attorney conducting a suit commits an act of negligence by which all the previous steps become useless in the result, he cannot recover for any part of the business done. Whether or not in such case the work became wholly useless by his fault is a question for the jury.² Such failure of the work has been held to be admissible as a defence under the general issue, in an action upon the attorney's bill,³ as in actions for negligence against the attorney the fact of his having been retained as an attorney is put in issue by non-assumpsit.⁴ Even where a jury has convicted an attorney of gross negligence, and he has brought an action for his bill of costs, the court has refused to stay proceedings in the latter action.⁵ But where there appears to be negligence or ignorance of the law on the part of the attorney, which creates unnecessary costs, the court will order the costs to be disallowed on taxation without prejudicing his right to bring an action for them.⁶

It is also held that where an attorney has been retained for the prosecution of a suit, and he has by *crassa negligentia* in the conduct of a suit caused the suit to be lost, he cannot recover any portion of the bill.⁷ As where, in bringing suit against an acceptor of certain foreign bills of exchange, the attorney did not ascertain whether his client's title was complete by special indorsement, as required by the law of the foreign country, and there being no such indorsement, the action was discontinued. The court held him guilty of such negligence as disentitled him from recovering the costs of the abortive proceedings.⁸

¹ Shaw v. Orden, 9 Bing. 287; 2 Moore & S. 341; 1 D. P. C. 705.

² Pracey v. Carter, 12 Ad. & E. 373; Fletcher v. Winter, 3 Fost. & F. 138.

³ Ibid.; Symes v. Nipper, Ibid. 337.

⁴ Aldes v. Gardner, 1 Car. & K. 564. See as to what does constitute such gross negligence on the part of the attorney as to disentitle him to his bill, Bullmer v. Gillman, 4 M. & G. 108; 4 Scott N. R. 781.

⁵ Smith v. Rolt, 2 D. P. C. 62.

⁶ Cliff v. Prosser, 2 D. P. C. 21.

⁷ Stokes v. Trumper, 2 Kay & J. 232.

⁸ Long v. Orsi, 18 Com. B. 610; 26 Law J. Com. P. 127. See Chapman v. Van Toll, 3 Jur. N. S. 1126; 27 Law J. Q. B. 1; 8 El. & B. 396.

In an action by attorneys for the costs of a defense which failed, they having been absent on the day of trial, and some of the witnesses consequently not be-

In an action against an attorney alleging that he was retained to conduct the defense of the plaintiff on a criminal charge, and that, through his negligence, the plaintiff was convicted, the plaintiff, in order to recover more than nominal damages, must prove that he was convicted mainly through the attorney's negligence, and the negligence being not taking the proofs of witnesses who were in court ready to be examined, but whom the counsel, on the plaintiff's own statement, did not wish to call, and whom the plaintiff did not insist on calling, the question for the jury was whether the attorney had done anything which, under all the circumstances, was likely to be of any use.¹

It has been held in numerous cases that to defeat an attorney's claim for compensation in a professional matter, such services must be shown to have been utterly worthless. The cases on this point are not agreed; and perhaps the weight of authority is in favor of admitting any evidence of negligence, ignorance, or want of skill as a defense to an action for professional services, as well as for any other work or labor.² But an attorney's right to compensation in one matter is not forfeited by his misconduct and breach of trust in another matter.³ And unless the client is in some way injured by his attorney's negligence, he cannot maintain an action even for nominal damages,⁴ and usually an attorney may recover his bill even if he has committed

ing in court, it was held they were entitled to recover, notwithstanding the verdict had passed against their clients, unless the jury thought that the absence the witnesses had caused the loss of the verdict, and so made his services wholly valueless. (*Dunn v. Hallen*, 2 Fost. & F. 642.)

¹ *Hatch v. Lewis*, 2 Fost. & F. 407; 7 Hurl. & N. 367; 31 Law J. Ex. 26; 7 Jur. N. S. 1085; 5 L. T. N. S. 254. Negligence or unskillfulness of one of a firm of attorneys is a good defense to an action by the firm for services; nor is a retiring partner relieved from liability for the firm's negligence by a dissolution of the firm. (*Warner v. Griswold*, 8 Cowen, 665; *Livingston v. Cox*, 6 Pa. 360; *Cholmondeley v. Clinton*, 19 Ves. 261; *Cooke v. Rhodes*, *Ibid.* 273; *Eager v. Barnes*, 31 Beav. 579; *Arden v. Tucker*, 4 Barn. & Adol. 815; *Kell v. Naiby*, 10 Barn. & C. 20; *Ward v. Lee*, 13 Wend. 41; *Perrins v. Hill*, 2 Jur. 858; *McFarland v. Crary*, 6 Wend. 297; S. C. 8 Cowen, 253. But see *Ayrault v. Chamberlain*, 26 Barb. 83.)

² 2 Greenl. on Evidence, sec. 143; *Bowman v. Tallman*, 2 Robt. 385; *Cousins v. Paddon*, 2 Crompt. M. & R. 547; *Randall v. Key*, 4 Dowl. 682; *Huntley v. Bulwer*, 6 Bing. N. C. 111; *Lewis v. Samuels*, 8 Q. B. 485; *Hopping v. Quinn*, 12 Wend. 517; *Long v. Orsi*, 18 Com. B. 610; *Hill v. Feathersborough*, 7 Bing. 569; *Hill v. Allen*, 2 Mees. & W. 284; *Lymes v. Nipper*, 12 Ad. & E. 377; *Bracey v. Carter*, *Ibid.* 373. See *Templer v. McLachlan*, 2 New R. 136; *Farnsworth v. Gerrard*, 1 Camp. 38.

³ *Currie v. Cowles*, 6 Bosw. 452.

⁴ *Harter v. Norris*, 18 Ohio St. 492.

an error, if it were such an error as a prudent man might fall into.¹

§ 303. Negligence of associates.—If a case requires the assistance of other counsel, and this is or ought to be known to the client, the original attorney is not liable for the negligence of the associate, unless he participates in it. He is only liable for negligence in selecting him, if he be an improper person. The client should be consulted, and if he acquiesce, it relieves the first attorney from liability.² But it is otherwise as to the attorney's own associates in the conduct of his office business; for they are regarded as his servants, and he is liable for all their acts within the scope of their employment,³ and where an attorney, without special authority, employs another person to prosecute a claim placed in his hands for collection, he is liable to his client for negligence of the person so employed by him, and the fact that such person is himself a competent lawyer does not relieve the attorney employing him from liability to his client on account of such negligence.⁴ So that it appears that the attorney is equally liable, whether the breach of duty has arisen through his own default or through the default of his agent or his clerk.⁵ A lawyer who appears for another without authority is liable for injuries caused by the intrusion.⁶

§ 304. Liability for matters not litigated.—Aside from litigated matters, the attorney is liable for negligence in examining the title to property of which his client is the proposed

¹ *Montrion v. Jefferys*, 2 Car. & P. 113, 1 Ry. & M. 317.

² Wharton on Agency, secs. 601, 276, 245, 604; *Watson v. Muirhead*, 57 Pa. 247; *Godfrey v. Dalton*, 6 Bing. 468; *Porter v. Peckham*, 44 Cal. 204.

³ Wharton on Agency, secs. 601, 276, 543-545.

⁴ *Walker v. Stevens*, 79 Ill. 193; *Abbott v. Smith*, 4 Ind. 452.

⁵ Wharton on Negligence, sec. 753; *Collins v. Griffith*, Barnes, 37; *Simmons v. Rose*, 31 Beav. 11; *Norton v. Cooper*, 3 Smale & G. 375; *Warner v. Griswold*, 8 Wend. 665; *Livingston v. Cox*, 6 Pa. 360; *Floyd v. Nagle*, 3 Atk. 568.

⁶ *Bradt v. Walton*, 8 Johns. 298; *O'Hara v. Bropley*, 24 How. Pr. 379; *Whitney v. Ex. Co.* 104 Mass. 152; *Bradstreet v. Everson*, 72 Pa. 124; *Lewis v. Peck*, 10 Ala. 142; *Pollard v. Rowland*, 2 Blackf. 22; *Wilkinson v. Griswold*, 12 Smedes & M. 669; *Power v. Kent*, 1 Cowen, 211; *Birbeck v. Stafford*, 14 Abb. Pr. 285; 23 How. Pr. 236; *Mardis v. Shackelford*, 4 Ala. 493; *Morgan v. Roberts*, 38 Ill. 65; *Smyth v. Harrie*, 31 Ill. 62; *Dwight v. Simon*, 4 La. An. 490; *Poole v. Gist*, 4 McCord, 250.

purchaser,¹ in drafting forms of attestation,² in omitting a seal where necessary,³ or in allowing his client to execute an improper covenant without informing him of its effect,⁴ but not for opinions in cases of doubtful title; and in England the advice of counsel may relieve the attorney, but if he consults counsel, the attorney must examine the title deeds fully and lay the whole title before the counsel. If he gives only partial abstracts, though furnished by the client, omitting important parts, he is guilty of negligence⁵ in not furnishing the whole.

An attorney employed to invest funds in security is liable, if through want of ordinary skill, care, and prudence, the security turns out to be invalid or insufficient as a matter of law. He is not bound to see that the value is adequate, unless he is especially employed for that purpose, nor to inquire into the personal responsibility of the borrower.⁶ When the attorney is guilty of negligence in investigating or not investigating the legal validity of the proposed securities, the plaintiff appears to be entitled to recover, in addition to the amount he has paid for a supposed good title, interest on the same during the time he held possession, especially if he has been compelled to pay *mesne* profits during the period.⁷

When he is retained to find an investment for money and to see that its value is sufficient, he is liable for the neglect of any precaution which a prudent and ordinarily skillful man would have taken.⁸

§ 305. Liability for acting in excess of authority.—An attorney generally has no authority to waive a judgment. He usually acts at his peril in so doing, and is responsible for loss,⁹

¹ *Ireson v. Pearman*, 3 Barn. & C. 799; *Brooks v. Day*, Dick. 572; *Brown v. Howard*, 4 J. B. Moore, 508; 2 Brod. & B. 202. See *Warne v. Kempster*, 1 Fost. & F. 695.

² *Elkington v. Holland*, 9 Mees. & W. 659.

³ *Parker v. Rolls*, 14 Com. B. 691.

⁴ *Stannard v. Ullithorne*, 10 Bing. 491; 4 Moore & S. 359.

⁵ *Wilson v. Tucker*, 3 Stark. 154; *Ireson v. Pearman*, 3 Barn. & C. 799.

⁶ *Donaldson v. Haldane*, 7 Clark & F. 762; *Brown v. Howard*, 4 J. B. Moore, 508; *Dartnall v. Howard*, 4 Barn. & C. 345.

⁷ *Allen v. Clark*, 11 W. R. 304; 7 Law T. N. S. 781.

⁸ *Haynes v. Rhodes*, 8 Q. B. 342; *Whitehead v. Greethan*, 2 Bing. 464; *Watts v. Porter*, 3 El. & B. 743; *Craig v. Watson*, 8 Beav. 427; *Green v. Dixon*, 1 Jur. 137; *Howell v. Young*, 5 Barn. & C. 529.

⁹ *Anon.* 1 Wend. 108; *Clussman v. Merkel*, 3 Bosw. 402.

and such action will also prevent him from recovering for his services; neither has he power to release sureties;¹ nor to enter a retraxit;² nor to release a witness;³ nor an indorser of a note, under an authority to sue the maker, at least without satisfaction or consent of client.⁴ He may be responsible for doing these things.

An attorney has no implied authority to make a compromise by which land is to be taken instead of money.⁵ So *a fortiori*, if an attorney takes payment in a depreciated currency he is liable to his client for the amount of the depreciation.⁶

In cases of negligence against attorney an action lies at once, but if there is a delay, the proof of actual damages may extend to those growing out of the injury up to the day of the verdict.⁷ The damages are usually confined to the loss actually sustained.⁸

§ 306. Acting without authority.—If an attorney commence or defend an action or suit without authority, he is also liable for the consequences to the principal.⁹ And so if he take any step out of the ordinary routine of his professional duty, without or contrary to instructions;¹⁰ but as attorneys are presumed to be invested with much discretion in the conduct of their professional duties, they are not generally amenable for acting in such matters which come within their legitimate province, even though contrary to the client's instructions.¹¹

An attorney, however, who undertakes the conduct of an action is liable for the consequences of not fully investigating the facts and evidence in support of it.¹²

¹ *Givens v. Briscoe*, 3 J. J. Marsh. 532.

² *Lambert v. Sandford*, 2 Blackf. 137.

³ *Marshall v. Nagel*, 1 Bail. 308; *Bowie v. Hyde*, 6 Barb. 392.

⁴ *East River Bank v. Kennedy*, 9 Bosw. 543.

⁵ *Huston v. Mitchell*, 14 Serg. & R. 307.

⁶ *Trumbull v. Nicholson*, 27 Ill. 149.

⁷ *Wilcox v. Plummer*, 4 Peters. 172; *Marzetti v. Williams*, 1 Barn. & Adol. 415.

⁸ *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 2 Chip. 117; *Jones v. Lewis*, 9 Dowl. Pr. 143; *Huntington v. Rumnill*, 3 Day, 390.

⁹ *Gilbert v. Williams*, 8 Mass. 51; *Anon.* 1 Salk. 88; *Hubbard v. Phillips*, 13 Mees. & W. 702; 2 D. & L. 707; *Anon.* 1 Wend. 108.

¹⁰ *Ibid.*; *Rolfe v. Rogers*, 4 Taunt. 191.

¹¹ *Cox v. Livingston*, 2 W. & S. 103; *Talbot v. McGee*, 4 Mon. 377; *Pike v. Emerson*, 5 N. H. 393; *Alton v. Gilmanton*, 2 *Ibid.* 520; 1 Hill, 249.

¹² *Thwaite v. Mackerson*, 3 Car. & P. 341; *Gill v. Lougher*, 1 Crompt. & J. 170; *Montgomery v. Devereaux*, 7 Clark & F. 188; *Wilson v. Russ*, 7 Shep. 421; *Kane v. Van Vrauken*, 5 Paige, 62; *Gihon v. Albert*, 7 *Ibid.* 278; *Salisbury v. Gourgas*, 10 Met. 442.

§ 307. Collection¹ and appropriation of money.—An attorney is liable for gross neglect in collecting a claim.¹ But it appears that an attorney who takes a note to collect is not chargeable with it unless he has received the money and refused to pay it over, or unless he might have made it and has not through neglect, or unless the debt is lost through unskillfulness.² Alleged negligence in collection is not substantiated by mere failure to account.³

An action cannot usually be maintained against an attorney for money collected by him, until demand has been made and payment refused or neglected, nor after the client has been guilty of inexcusable laches, as for instance a delay of six years from the inception of the claim, or six years after demand, or of course if the Statute of Limitations has run.⁴

Where the relation with the client involves a series of acts and duties, an action will not lie until the relation is dissolved; but while in single transactions, as the collection of a debt, suit should not be brought until demand made, still if an attorney does not pay over or give notice of money collected within a reasonable time, it is negligence which will justify an action brought without demand.⁵

If an attorney undertakes to collect a debt, and by his gross negligence makes it of less value and embarrasses the collection

¹ *Reilly v. Cavanaugh*, 29 Ind. 435; *Eccles v. Stevenson*, 3 Bibb, 517; *Dearborn v. Dearborn*, 15 Mass. 316; *Oldham v. Sparks*, 28 Tex. 425.

² *Hazelrigg v. Brenton*, 2 Duval, 525; *Croft v. Hicks*, 26 Tex. 383; *Morrill v. Graham*, 27 Tex. 646; *Nisbet v. Lawson*, 1 Kelly, 275; *Oldham v. Sparks*, 28 Tex. 425; *Fleming v. Culbert*, 46 Pa. 498; *Rose v. Gerrish*, 8 Allen, 147; *Pidgeon v. Williams*, 21 Gratt. 251; *Johnson v. Semple*, 31 Iowa, 49. In an action against an attorney for failure to collect a note, a count stating that the plaintiff caused to be delivered to the defendant, and the defendant received from him, a note made by a third person, calling for so many dollars, to bring suit and recover and collect of that third person, for the use and benefit of the plaintiff, for a certain fee and reward to the defendant in that behalf, is defective in not stating the plaintiff's title: and this defect is not cured by a verdict which will not support a judgment. (*Sevier v. Holliday*, 2 Ark. 512.)

Under such count, the plaintiff cannot prove title; and if he could, a receipt given by the defendant to the plaintiff of a note described, on which the plaintiff does not appear as a party in any capacity, would not be evidence of it. (*Ibid.*)

³ *Bougher v. Schobey*, 23 Ind. 583.

⁴ *Ibid.*; *People v. Brotherson*, 36 Barb. 662; *Black v. Hersch*, 18 Ind. 342.

⁵ *Glen v. Cuttle*, 2 Grant, 273; *Denton v. Embury*, 10 Ark. 228. See *Burke v. Stillwell*, 23 Ark. 294.

of it, as receiving a note and mortgage contrary to the direction of his client, he is liable although the debtor be still solvent.¹ If an attorney collects money under the direction and in the name of an agent, knowing that it belongs to the principal, and by order of the agent pays it in discharge of debts of the agent, such action does not relieve the attorney from liability to the principal.² Where a solicitor allowed shares belonging to a client to be forfeited by neglect, and afterward replaced them, giving less than would have originally been paid, it was held that the client could only claim to be placed in the same position as if the shares had never been forfeited.³ The damages to which an attorney is liable for neglect do not necessarily extend to the whole amount of the debt which he undertakes to collect, but only to the loss which his client has actually sustained.⁴ An attorney who, after making a part of certain collections, under a special contract to be allowed a certain share for his services, refuses his client's demand to account, cannot claim the benefit of the contract as to money thereafter collected,⁵ nor can he set up that a claim collected was illegally acquired either by the plaintiff or by his assignor, the original owner.⁶ An attorney who uses as his own, money collected for his client, is liable for interest.⁷ Summary applications to compel attorneys to pay over money are only entertained on motion of the client; not of his assignees.⁸ A receipt appearing on its face to be that of an attorney for a claim taken for collection, may be explained by parol evidence. An attorney receiving and holding a claim for the convenience of the owner, for the purpose only of receiving and paying over money paid thereon, and for which the attorney neither charges nor receives compensation, cannot be held responsible on the debt being barred by limitation.⁹ An attorney may interpose the plea of the Statute of Limitations

¹ *Wilson v. Coffin*, 2 Cush. 316; *White v. Goffe*, 24 Tex. 658.

² *Nisbet v. Lawson*, 1 Kelley, 275.

³ *Smith v. Pocock*, 23 Eng. Law & Eq. 470.

⁴ *Cox v. Sullivan*, 7 Ga. 144.

⁵ *McDowell v. Baker*, 29 Ind. 481.

⁶ *Fogarty v. Jordan*, 2 Rob. (N. Y.) 319.

⁷ *Mansfield v. Wilkerson*, 26 Iowa, 482. But, not, it is said, until after demand. (*Johnson v. Semple*, 31 Iowa, 49.) Or until a wrongful conversion. (*Walpole v. Bishop*, 31 Ind. 156.)

⁸ *Hess v. Joseph*, 7 Rob. (N. Y.) 609.

⁹ *McAdoo v. Lummis*, 43 Tex. 227.

when sued by his client for money which he has collected as attorney and failed to pay over, although no action can be maintained against an attorney for failing to pay over money collected for his client until he has failed or refused to pay it over after demand made. Yet the client cannot by this principle of law excuse his laches in not making a demand within a reasonable time after he knows of the collection and conversion of the money.¹ No action can be maintained against an attorney for failing to pay over money collected for his client, until it has been demanded, and he has failed or refused to pay it over.²

An attorney collected money for a client, and remitted the amount by a draft of one bank on another, payable to the client's order and endorsed by him. The client received the money, and directed the attorney "to send the balance in the same way." The attorney sent another sum in the same way, and the draft was received, but before it could be collected the drawer failed, and it was not paid. It was held that the attorney was not liable as indorser. The indorsement was intended merely to transfer the attorney's legal title to his client, and not to incur a responsibility as indorser.³

Payment of an execution to an officer having the same discharges the debtor; but proof of such payment does not raise any presumption of payment over by the officer to the plaintiff's attorney, and the consequent liability of the attorney to the creditor. Proof of payment by the officer to the attorney is necessary to fix the latter's liability.⁴ A mere notice to the attorney of record not to pay over the money collected to the client, given by persons claiming an interest in the fund, does not justify the attorney in detaining the same in his hands. The claimant should resort to an injunction, or garnishment, or some such proceeding.⁵ An attorney should not, without special authority, deliver his client's money to any third person whatever; if he does, he is liable for losses or negligence by the lat-

¹ *Kimbro v. Waller*, 21 Ala. 376.

² *Taylor v. Bates*, 5 Cowen, 376; *Rathbun v. Ingalls*, 7 Wend. 320; *Staples v. Staples*, 4 Greenl. 533; *Taylor v. Armstead*, 3 Call. (Va.) 200; *Hutchings v. Gilman*, 9 N. H. 359; *Buchanan v. Parker*, 5 Ired. 597.

³ *Kimmell v. Bittner*, 62 Pa. 203.

⁴ *Wilson v. Russ*, 20 Me. 421.

⁵ *Dunn v. Vannerson*, 8 Miss. 579.

ter. Even where the money was stolen from a messenger of the attorney, the latter was held liable.¹

§ 308. Paying over moneys.—An attorney is liable to pay over moneys received by him after demand. The attorney should notify his client of his receipt of money for the latter within a reasonable time. If such notice is given, the client has no cause of action until after demand and refusal.² If the attorney is in doubt as to whether the money belongs to the client or not, he must pay it over on the tender by the client of sufficient indemnity, unless the fund be attached or enjoined in his hands.³ If there is, however, a relation involving a series of acts and duties, and the money depends upon the relation, the attorney is not liable until the relation is closed.⁴

The commencement of an action against an attorney constitutes a sufficient demand for money collected by him.⁵ But it is also said that ordinarily a demand is necessary before bringing suit against an attorney for money collected by him; but where it has been collected a long time, and its retention is unexplained, or where the party collecting has converted it to his own use, no previous demand is necessary.⁶ Where an attorney settles a judgment recovered by him for his client by allowing the same in payment of an account against himself, his client may repudiate his act, and enforce the judgment, or he may ratify it, and sue the attorney for money had to his use.⁷

¹ Grayson v. Wilkinson, 13 Miss. 268.

² Wharton on Agency, sec. 606; Glenn v. Cuttle, 2 Grant Cas. 273; Bougher v. Scobey, 16 Ind. 152; Evans v. King, 16 Mo. 525; Beardslee v. Boyd, 37 Mo. 180; Krause v. Dorrance, 10 Pa. 462; Denton v. Embury, 10 Ark. 228; Cummins v. McLean, 2 Pike, 402; Jett v. Hempstead, 25 Ark. 462; Black v. Hersch, 18 Ind. 342; Taylor v. Armstead, 3 Call. (Va.) 200; Rathburn v. Ingalls, 7 Wend. 320; Taylor v. Bates, 5 Cowen, 596; Satterly v. Frazer, 2 Sand. 141; People v. Brotherson, 36 Barb. 662; Mardis v. Shackelford, 4 Ala. 493. See, *contra*, Coffin v. Coffin, 7 Greenl. 298.

³ Wharton on Agency, sec. 606; Marvin v. Ellwood, 11 Paige, 365; Dunn v. Vannerson, 8 Miss. 000; 7 How. 579.

⁴ Glenn v. Cuttle, 2 Grant Cas. 273.

⁵ Hollenbeck v. Stanberry, 38 Iowa, 325.

⁶ Chapman v. Burt, 77 Ill. 337. That a demand is necessary, see also Pierce v. Thornton, 44 Ind. 235; Armstrong v. Smith, 3 Blackf. 251; Judah v. Dyott, 3 Ibid. 324; Black v. Hersch, 18 Ind. 342; Bougher v. Scobey, 23 Ind. 583; Walpole v. Bishop, 31 Ind. 156; Green v. Chipman, 32 Ind. 195.

⁷ Chapman v. Burt, *supra*.

Another statement of this rule is as follows: An action cannot be maintained against an attorney at law for money collected as such until after a demand and refusal to pay over. It is the duty of the attorney who has collected money to give notice of the fact to his client within a reasonable time. Upon receiving such notice, the client is bound to make demand within a reasonable time, and if he omits to do so he puts the Statute of Limitations in motion. But if the attorney neglects to notify his client, the latter may maintain suit without previous demand. The statute will not commence to run unless the client has notice by some means, unless the attorney can show that the client could by ordinary diligence have known of the collection.¹

If, however, the attorney does not account to the client, or is guilty of negligent detention of the fund, or of culpable negligence in collection, a demand is not necessary.² Neither is it necessary if the attorney deny the agency.³

The remedy in cases of conversion by the attorney is an action of trover.⁴ If the attorney account to the client for a balance, a promise to pay the balance is inferred.⁵

The attorney cannot generally, in suits brought against him by his client, set off collateral claims nor private debts.⁶ Nor can he set up as a defense the illegal acquisition of the claim by the plaintiff,⁷ though if the contract is executory the plaintiff cannot recover.

§ 309. Accounting and payment.—An attorney is not usually liable to an action by his client for money collected

¹ *Jett v. Hempstead*, 25 Ark. 462.

² *Wharton on Agency*, sec. 607; *Denton v. Embury*, 10 Ark. 228; *Glenn v. Cuttle*, 2 Grant Cas. 273; *Cummins v. McLain*, 2 Ark. 402; *Mardis v. Shackelford*, 4 Ala. 493. See *Coffin v. Coffin*, 7 Greenl. 298; *Houston v. Frazier*, 8 Ala. 81.

³ *Ibid.* *Tillotson v. McCrillis*, 11 Vt. 477.

⁴ *Houston v. Frazier*, 8 Ala. 81; *Colton v. Sharpstein*, 14 Wis. 446.

⁵ *Cameron v. Clark*, 11 Ala. 259.

Even without demand, he is liable for money belonging to his client as his client's garnishee. (*Staples v. Staples*, 4 Greenl. 533; *Thayer v. Sherman*, 12 Mass. 441.) The attorney must exercise due diligence in transmitting funds to his client, and losses arising from forwarding them by an unauthorized and unusual mode must be borne by the attorney. (*Grayson v. Wilkinson*, 13 Miss. 268.)

⁶ *New Castle v. Bellard*, 3 Me. 369; *Houx v. Russell*, 10 Mo. 246.

⁷ *Fogerty v. Jordan*, 2 Robt. N. Y. 319. A suit in chancery by a client, against his attorney, for negligence and a failure to pay, when there is no complexity or difficulty in the account, cannot be maintained. (*Crothers v. Lee*, 29 Ala. 337.)

until after demand made, or a direction to remit.¹ He is not considered in default till he receives orders from his principal.² But still circumstances may exist which will dispense with the necessity of a demand, as where the attorney has not given notice of the receipt of the money within a reasonable time, as it is his duty to do,³ or exhibits a manifest desire to baffle the client or withhold the money.⁴ If he has doubts whether the debts collected belong to the client he should ask indemnity.⁵

An action for money had and received lies against an attorney who, having a debt to collect, receives in payment debts on himself or on others without authority from his principal.⁶ And if an attorney collects money for his client and uses the money as his own, he may be held liable for interest thereon during such use.⁷ So if he receives property from a defendant in satisfaction of a client's judgment, and disposes of it without rendering an account, he may be charged the amount he received for it as money;⁸ and an attorney, like any other agent, is liable in trover for the conversion of the money of his principal.⁹

¹ *Rathbun v. Ingals*, 7 Wend. 320; *People v. Brotherson*, 36 Barb. 662; *Pierse v. Thornton*, 44 Ind. 235; *Cummins v. McLain*, 2 Ark. 402; *Mardis v. Shackelford*, 4 Ala. 493; *Voss v. Bachop*, 5 Kan. 59; *Walradt v. Maynard*, 3 Barb. 584; *Beardsley v. Boyd*, 37 Me. 180; *Black v. Harsh*, 18 Ind. 342.

² *Krause v. Dorrance*, 10 Pa. 462; *Cummins v. McLain*, 2 Ark. 402.

³ *Glenn v. Cuttle*, 2 Grant Cas. 273; *Denton v. Embury*, 10 Ark. 228.

⁴ *Krause v. Dorrance*, *Cummins v. McLain*, *supra*; *Mardis v. Shackelford*, 4 Ala. 493.

⁵ *Marvin v. Ellwood*, 11 Paige, 365; *Sims v. Brown*, 6 Thomp. & C. 5. Where an attorney denies his liability to pay, and sets up a claim against his client exceeding the amount collected, this is equivalent to a waiver of a demand. (*Walradt v. Maynard*, 3 Barb. 584.)

⁶ *Houx v. Russell*, 10 Mo. 246.

⁷ *Mansfield v. Wilkerson*, 26 Iowa, 482; *Walpole v. Bishop*, 31 Ind. 156; *Hover v. Heath*, 3 Hun, 283.

⁸ *Christy v. Douglass*, Wright, 485.

⁹ *Cotton v. Sharpstein*, 14 Wis. 226. Where an attorney appears and defends for another, and receives money as attorney due to his assumed client, he is estopped to deny, in an action by the latter for the money, that he was his attorney. (*McFarland v. Crary*, 8 Cowen, 253.) A complaint alleged that the plaintiff, together with another party, had placed in the hands of the defendant, for collection, a large amount of claims; that these claims were all collectible, but were unaccounted for by the defendant, who had refused to render any account thereof to the plaintiff upon his demand. Held, that the plaintiff could not recover of the attorney the value of the notes, or the notes themselves, but that he was entitled to an accounting, and to receive any money that had been collected. (*Bougher v. Scobey*, 23 Ind. 583.) Persons depositing notes with attorneys for collection, have a right to demand and have an accounting, to know the

§ 310. Disclosing secrets.—An attorney professionally entrusted with the secrets and confidential disclosures of his clients is civilly liable in an action for damages for making them known to the opposing party. Assisting the other party to obtain execution,¹ disclosing defects in his client's title, by reason of which the client is put to the expense of litigation or delayed in raising money, or compelled to give a higher rate of interest, are all in the same category, and are breaches of duty, fixing legal responsibility on the attorney. He is not liable for disclosing in evidence circumstances not confidentially communicated; as for example, the execution of a deed, or a non-professional conversation after the business with the client has closed.² He is equally liable, however, if the communication be confidentially made, whether it is made in an action or in the course of a private negotiation where the services were retained.³

Attorneys are liable for betraying confidences reposed in them, and especially for disclosing to the opponents in a cause the evidence in their clients' cases, or other secrets intrusted to them. In the first place they are guilty of a gross breach of moral duty; in the second, they are guilty of gross violation of professional duty and professional decency; and in the third place they are civilly liable in damages to their clients.⁴ It is gratifying to find that the cases on this subject are exceedingly few. We have seen⁵ what communications are considered privileged, and what are not, and that it is not necessary for them to be privileged that they should be made in an action or suit, or even in contemplation of one;⁶ that communications made in the course

condition of the claims and to receive the amounts collected, subject only to just exceptions. (*Bougher v. Scobey*, 19 Ind. 151.)

¹ *Lawrence v. Harrison*, Styles, 426; *Taylor v. Blacklow*, 3 Bing. N. C. 235; 3 Scott, 614.

² *Walker v. Wildman*, 6 Madd. 47; *Bramwell v. Lucas*, 2 Barn. & C. 745; *Cobden v. Kendrick*, 4 T. R. 431.

³ *Greenough v. Gaskill*, 1 Mylne & K. 98.

⁴ *Taylor v. Blacklow*, 3 Bing. (N. C.) 249; *Wilson v. Troup*, 7 Johns. Ch. 25; 2 Cowen, 195; *Rhoades v. Selin*, 4 Wash. C. C. 718; *Chirac v. Reinicker*, 11 Wheat. 280; *Rogers v. Dare*, Wright, 136.

⁵ *Ante*, Chap. VIII.

⁶ Of course the attorney is not liable for disclosing in evidence communications not confidentially communicated. (*Walker v. Wildman*, 6 Madd. 47; *Brammell v. Lucas*, 2 Barn. & C. 745; *Riggs v. Denniston*, 3 Johns. Cas. 168; *Heister v. Davis*, 3 Yeates, 4; *Jordan v. Hess*, 13 Johns. 492; *Hoffman v. Smith*, 1 Caines, 157.)

of a private negotiation, when an attorney's services are retained, are equally within the rule. In case of a disclosure of any of these privileged communications, (the privilege, as we have seen, being for the benefit of the client) the attorney is liable in an action for betraying the confidence reposed in him by his client.¹ The courts may also in various ways prevent an attorney from making such disclosures when they are threatened. They may refuse to hear him testify, they may restrain him by injunction, or even strike his name from the roll,² just as they may prevent another outrage upon a client, should it be threatened, viz: acting for opposite parties, or for both parties, when their interests are conflicting.³ But if the attorney has been discharged from his original employment, the courts will not generally interfere, unless it clearly appear that he has obtained information in his former character which it would be prejudicial to the cause of his former client to communicate.⁴

§ 311. Investment of money—Sufficiency of securities—Investigation of titles.—If an attorney invests his client's money on security which proves altogether insufficient—as a question of law, not of money value—this is such gross negligence as almost to amount to fraud, and is sufficient to fix his liability; and the client can claim the amount in a suit for the administration of the attorney's estate, without establishing the right at law.⁵ And if an attorney employed to record a mortgage neglects to do so until after other subsequent incumbrances have been recorded, he is liable immediately to the mortgagee for all the damages which are likely to be sustained by his default.⁶ And so if the attorney is employed to collect a debt, and instead of suing takes a note and mortgage from the debtor, although with the client's consent, but negligently fails to dis-

¹ *Taylor v. Blacklow*, 3 Bing. (N. C.) 235.

² *Cholmondeley v. Clinton*, 19 Ves. 261; *Bolton v. Liverpool*, 1 Mylne & K. 88; *Jackson v. French*, 3 Wend. 339; *Andrews v. Solomon*, Peters C. C. 356.

³ *Peter v. Watkins*, 3 Bing. (N. C.) 421; *Harvey v. Mount*, 8 Beav. 439; *Clay v. Williams*, 2 Munf. 105.

⁴ *Robertson v. Marriott*, 2 Crompt. & M. 183; *Beer v. Ward*, 1 Jacob, 77; *Bricheno v. Thorpe*, 1 Jacob, 300; *Grissell v. Peto*, 9 Bing. 1; *Robinson v. Mullett*, 4 Price, 353.

⁵ *Smith v. Pocock*, 23 Eng. L. & E. 470; *Arnold v. Robertson*, 3 Daly, 298.

⁶ *Miller v. Wilson*, 24 Pa. 114.

cover a previous petition of insolvency, and to make due search, after his own suspicions are aroused, and so the debt be lost.¹ And where an English attorney, in laying a case before counsel, omitted certain deeds from an abstract, and failed to state the whole chain of title, so that the counsel gave an opinion which he would not have done had he known all the facts, and to the effect that the title was good, when it turned out to be bad; the jury were warranted in finding the attorney guilty of negligence so as to make him liable.² But where a conveyancer, with no want of ordinary skill and caution, passed a title to certain ground-rents incumbered by an unliquidated judgment, after taking legal counsel, and being informed therein that the title was clear, it was held an error of judgment for which he, as in case of an attorney, could not be liable, any more than in any case of reasonable doubt.³

If searches as to title are required, omission to make them is negligence, for which the attorney may be liable.⁴ But a conveyancer is justified in taking the opinion of counsel as to the existence of incumbrances. The case, however, must be fairly stated to the counsel.⁵ An attorney employed to examine a title is not required to consider the value of the property incumbered, nor is he bound to caution his client against improbable contingencies of loss.⁶

When an attorney advises a client who advances money on the security of a legacy given to the borrower under a will, he is not warranted in relying upon a partial extract from the will, but should examine the will itself.⁷ Personal representatives of attorneys have been held liable for the negligence of decedents in failing to properly investigate titles, and in ascertaining the invalidity of securities.⁸ Attorneys may be responsible for the

¹ *Cooper v. Stephenson*, 12 Eng. L. & E. 403.

² *Ireson v. Pearman*, 3 Barn. & C. 799.

³ *Watson v. Muirhead*, 57 Pa. 161.

⁴ Wharton on Agency, sec. 597; *Cooper v. Stephenson*, 21 Law J. N. S. Q. B. 292; *Watts v. Porter*, 3 El. & B. 743; *Miller v. Wilson*, 24 Pa. 114; *Gilman v. Hovey*, 26 Mo. 280; *Gore v. Brazier*, 3 Mass. 543; *Sprague v. Baker*, 17 Mass. 586; *Clark v. Marshall*, 34 Mo. 429.

⁵ *Andrew v. Hawley*, 23 L. T. Ex. 323; *Watson v. Muirhead*, 57 Pa. 161.

⁶ *Hayne v. Rhodes*, 8 Q. B. 342; *Chapman v. Chapman*, L. R. 9 Ex. 276; *Brumbridge v. Massey*, 28 Law J. N. S. Ex. 59.

⁷ *Wilson v. Tucker*, 3 Stark. 154.

⁸ *Knights v. Quarles*, 4 Moore, 532; 2 Brod. & B. 102; *Allen v. Clark*, 11 Week. R. 304; 7 L. T. N. S. 781.

consequences of allowing their clients to execute unusual covenants, without explaining the liability incurred thereby.¹ The attorney, it has been held, is liable for disclosing defects in his client's title to the proposed lender, by which the mortgagor is delayed in procuring money, and compelled to pay a high rate of interest, and this where the attorney had previously had the proposed mortgagee for a client.²

It appears that an attorney may be liable for mistakes in points of practice;³ but not in cases of doubtful or unsettled points of practice.⁴

In actions of negligence for failing to properly investigate securities, if the declaration state that the plaintiff retained the defendant, an attorney, to see if a certain security was good, and that he accepted the retainer and neglected his duty, and represented the security to be good, and that plaintiff advanced his money, and that the security was bad, by means of which the plaintiff lost, etc., it states a sufficient cause of action.⁵ The declaration should allege the particular character in which the attorney is retained, or it is bad, as that he was retained as attorney, etc.⁶ The retainer to investigate a title, or see if a security is sufficient, does not involve or require any inquiry upon the part of the attorney as to the money value of the security, without an express agreement to that effect. What is meant by "good and sufficient" is "good" or "sufficient" in point of law, not of money value.⁷

Where the attorney is employed to invest the money and *find* the proper security a different rule prevails, and of course it is the duty of an attorney in any event to apprise his client of any peculiar circumstances coming to his knowledge in the transac-

¹ *Stannard v. Ullithorne*, 10 Bing. 491; 4 Moore & S. 359.

² *Taylor v. Blacklow*, 3 Bing. (N. C.) 235; 3 Scott, 614; 2 Hodges, 224.

³ *Russell v. Palmer*, 2 Wils. 325.

⁴ *Pitt v. Yalden*, 4 Burr. 2060; *Laidler v. Elliott*, 3 Barn. & C. 738; 5 Dowl. & R. 635; *Bakie v. Chandless*, 3 Camp. 17, 19; *Compton v. Chandless*, *Ibid*.

⁵ *Howell v. Young*, 5 B. & P. 259; 8 Dowl. & R. 14; 2 Car. & P. 238; *Whitehead v. Greetham*, 2 Bing. 464; *McClell. & Y.* 205; 10 Moore, 183; *Hanlon v. Murray*, 12 I. R. C. L. 161.

⁶ *Dartnall v. Howard*, 6 Dowl. & R. 438; 4 Barn. & C. 345.

⁷ *Hayne v. Rhodes*, 8 Q. B. 342; 10 Jur. 71; 15 Law J. Q. B. 137. See, generally, *Waine v. Kempster*, 1 Fost. & F. 695; *Brumbridge v. Massey*, 28 Law J. Ex. 59; 32 L. T. 108; *Cooper v. Stephenson*, 16 Jur. 424; 21 Law J. Q. B. 292.

tion in which he is engaged, as if any obvious insufficiency of value should appear upon the title deeds.¹

§ 312. Advice as to titles.—Defective advice as to titles constitutes negligence involving liability; and whether the adviser ranks as a conveyancer or as a counsel, his liability is the same. But he is not bound to *perfect* accuracy nor *perfect* care. He is not expected to anticipate rulings overturning the law as it existed when he gave his opinion. It is sufficient if he accept the law accepted by good professional men of his particular class at his particular place. He is neither the insurer of the papers committed to his care, nor of their accuracy. If through his carelessness, or that of his clerk, loss ensues, he is liable.²

A bill in equity will not lie against a solicitor for negligence in investigating a title. A court of equity will not compel a solicitor to take the mortgage security off his client's hands, and find the money necessary for the purpose.³ If an attorney be lulled by the assurance of his client into a persuasion that the security on which such client proposes to advance money is good, so that he abates his vigilance in the inquiry as to its validity, his liability for negligence is discharged.⁴

§ 313. Effect of non-payment of fees—Gratuitous services.—Notwithstanding an old case to the contrary,⁵ an attor-

¹ Dartnall v. Howard, 4 Barn. & C. 345; Craig v. Watson, 8 Beav. 247. See In re Valpy, Law R. 7 Ch. 289; Miller v. Wilson, 24 Pa. 114.

² Watson v. Muirhead, 57 Pa. 161; Wharton on Agency, sec. 597; Fotts v. Dutton, 8 Beav. 493; Taylor v. Gorman, 4 Ir. Eq. 550; Wilson v. Tucker, 3 Stark. 154; Dowl. & R. N. P. C. 30; Knights v. Quarles, 4 Moore, 532; S. C. 2 B. & B. 102; Allen v. Clark, 7 L. T. N. S. 781; 1 N. R. 358; Drax v. Scroupe, 1 D. P. C. 69; 2 B. & A. 581; Stannard v. Ullithorne, 10 Bing. 491; S. C. 4 Moore & S. 539; Ireson v. Pearman, 5 Dowl. & R. 687; 3 Barn. & C. 799; Howell v. Young, 5 Bos. & P. 259; 8 Dowl. & R. 14; 2 Car. & P. 238; Whitehead v. Greetham, 2 Bing. 464; 10 Moore, 183; Dartnell v. Howard, 6 Dowl. & R. 438; 4 Barn. & C. 345; Brumbridge v. Massey, 28 Law J. Ex. 59; Cooper v. Stephenson, 21 Law J. Q. B. 292; Hayne v. Rhodes, 8 Q. B. 342.

³ British Company v. Cobbold, 19 Law Rep. Eq. 627; Mare v. Lewis, Ir. L. R. 4 Eq. 219. See Smith v. Pococke, 2 Drew, 197; Chapman v. Chapman, Law R. 9 Eq. 276; Craig v. Watson, 8 Beav. 427; Dixon v. Wilkinson, 4 De Gex & J. 508; — v. Jolland, 8 Ves. 72.

⁴ 1 Dowl. & R. 30.

Slander of title.—An attorney of a party claiming title to premises put up to sale is not liable in an action of slander of title, if he, *bona fide*, though without authority, makes such objections to the vendor's title as his principal would have been authorized in making. (Watson v. Reynolds, 1 Moody & M. 1.)

⁵ Mordecai v. Solomon, Sayer, 172.

ney is not bound to proceed upon a general retainer without being provided with funds; and so where a motion was made to compel an attorney to proceed in a suit upon the ground that he might be compelled to proceed, though he might lose his costs, it appearing that considerable costs had accrued in the progress of the suit, and that the attorney for the plaintiff refused to proceed further until he was paid the amount. The court said: "The conduct of the attorney is justifiable. He is not bound to go on and expend money for his client without being secured. The cases cited show merely that the court will compel an attorney to do his duty; but it is not his duty to expend money for his client without being reimbursed."¹ But if he has waived the matter of compensation, the case is different, and in an action against an attorney for neglect in the management of a suit, it is not necessary to aver that the plaintiff had paid him or secured him a fee; an averment that the defendant undertook to prosecute the suit for a sum thereafter to be paid is sufficient; nor is it a defense that the attorney undertook the case without consideration. It is enough that he undertook to conduct the suit, and in his management of it was guilty of such a neglect of his duty as to subject the plaintiff to a loss. After this it is not competent for him to allege a want of consideration.² It does not at all interfere with the attorney's liability that the services are gratuitous. Confidence bestowed and accepted is enough. Still more is the attorney liable for damages for officious intermeddling with a case.³

The attorney should not abandon the cause, on the ground of the want of money, without giving his client reasonable notice; for if he do, he will be liable to an action for negligence, and he will be deprived of his right to his costs.⁴ And it seems that an attorney who declines to proceed with an action cannot retain his client's papers under a claim of lien.⁵ But in a late

¹ *Castro v. Bennet*, 2 Johns. 296; *Gleason v. Clark*, 9 Cow. 57. See also *Wadsworth v. Marshall*, 2 Crompt. & J. 665; *Rowson v. Earle*, Moody & M. 538; *Van Sandau v. Brown*, 9 Bing. 402; 2 Moore & S. 543; 1 Dowl. O. S. 715; *Lawrence v. Potts*, 6 Car. & P. 428.

² *Eccles v. Stephenson*, 3 Bibb. 517; *Stephens v. White*, 2 Wash. Va. 203.

³ *Wharton on Negligence*, sec. 436; *Wharton on Agency*, sec. 600; *Bradt v. Walton*, 8 Johns. 298; *O'Hara v. Brophey*, 24 How. Pr. 279.

⁴ *Hoby v. Built*, 3 Barn. & Adol. 350; *Lawrence v. Potts*, 6 Car. & P. 428; *Nichols v. Wilson*, 11 Mees. & W. 106; S. C. 2 Dowl. N. S. 715.

⁵ *Van Sandau v. Brown*, 9 Bing. 402; S. C. 2 Moore & S. 543; S. C. 1 Dowl. O. S. 715.

case in chancery, it was said by Lord Cottenham that Lord Eldon's opinion, that a solicitor discharging himself cannot claim a lien, must be understood as meaning, not that the solicitor loses his lien altogether, but that he cannot set it up so as to prevent his client proceeding in the cause. The rule is, that the solicitor shall have every security not inconsistent with the progress of the cause; but he will not be permitted to impose upon the plaintiff the necessity of carrying on the cause in an expensive, inconvenient, and disadvantageous manner. He will, therefore, be ordered, (on the petition of his client) to hand over to the new solicitor all proceedings and documents necessary for the hearing without prejudice to his lien, which are to be returned undefaced within a fixed time after the hearing.¹ Though in a more recent case before Lord Langdale, master of the rolls, where, after demurrer to a bill for want of equity by two material defendants had been allowed, the solicitor for the complainant refused to proceed in the cause without payment of his bill of costs, and the complainant appointed a new solicitor; it was held that, under the circumstances, the original solicitor was not bound to deliver over the papers in his possession, without an assurance that the suit would be prosecuted by the new solicitor.²

The obligation of an attorney is to his client and not to casual inquirers,³ but it is not necessary to fix the liability, that there be a compensation paid or to be paid.⁴ An attorney may be liable though his services were rendered gratuitously, but an attorney so acting is liable only for gross negligence.⁵ As a matter of pleading, it is sufficient to state that the defendant was retained as attorney, without stating the consideration.⁶ An averment that defendant undertook to prosecute the suit for a sum thereafter to be paid is sufficient.⁷ The plaintiff may frame his action in assumpsit or case for the breach of duty.⁸

¹ *Heslop v. Metcalf*, 3 Mylne & C. 183.

² *Caine v. Martin*, 4 Lond. Jur. 500; 2 Beav. 584.

³ *Fish v. Kelly*, 17 Com. B. N. S. 196.

⁴ *Donaldson v. Holdane*, 7 Clark & F. 762.

⁵ *Bourne v. Diggles*, 2 Chit. 311; *Whitehead v. Greetham*, 2 Bing. 464.

⁶ *Bourne v. Diggles*, 2 Chit. 311; *Whitehead v. Greetham*, 2 Bing. 464.

⁷ *Eccles v. Stephenson*, 3 Bibb, 517; *Stephenson v. White*, 2 Wash. 203; *Binghart v. Gardner*, 3 Barb. 64.

⁸ 2 Chit. Pl. 373; *Church v. Mumford*, 11 Johns. 479; *Stimpson v. Sprague*, 6 Me. 470.

An attorney who takes legal proceedings in the name of another without authority is, of course, liable to such person, or to any other person who is immediately prejudiced thereby.¹

Where solicitors are in partnership, they cannot dissolve their partnership as against the client without his consent, so as to discharge the retiring partner from liability; much less can the latter accept a retainer from the opposite party.²

§ 314. Liability of law partners.—Attorneys practicing in partnership are equally responsible for money collected and not paid over, though one of them did not participate in the particular transaction.³ When two attorneys are in partnership, and one receives money, demand on him is a demand on both, and renders both liable.⁴ Where two attorneys are in partnership, and one does the business of a client unskillfully, both are liable to him in damages;⁵ and it is said that partnerships between attorneys are subject to the incidents to mercantile partnerships to this extent, that one partner is liable upon the contracts made by the other within the scope of the partnership business, and for his negligence in respect to a partnership contract; and a right of action against the firm survives against the survivor alone.⁶ And where a demand is placed in the hands of two attorneys, in partnership to collect, and before the money is collected on the execution the attorneys dissolve partnership, and afterward one of them receives the money from the sheriff, and gives a receipt in his own name, and neglects to pay the money over to the client, both the attorneys are liable as partners.⁷ Either partner may attend to business intrusted to the firm; but if the firm contracts with a client for the personal

¹ *Westaway v. Frost*, 17 Law J. Q. B. 286; *Bradt v. Walton*, 8 Johns. 289; *O'Hara v. Brophy*, 24 How. Pr. 379; *Field v. Gibbs*, Peters C. C. 155; *Munnikuyson v. Dorset*, 2 Har. & G. 374; *Cort v. Sheldon*, 1 Tyler, 300; *Ellsworth v. Campbell*, 31 Barb. 134; *Hubbard v. Phillips*, 13 Mees. & W. 702; *Hoskins v. Phillips*, 16 Law J. Q. B. 333; *Duper v. Keeling*, 4 Car. & P. 102; *Andrews v. Hawley*, 26 Law J. Ex. 323; *Cottrell v. Jones*, 11 Com. B. 713.

² *Cholmondeley v. Clinton*, Coop. 80; 19 Ves. 261; *Cook v. Rhodes*, 19 Ves. 273*n*; *Walker v. Goodrich*, 16 Ill. 341.

³ *Dwight v. Simon*, 4 La. An. 490.

⁴ *McFarland v. Crary*, 8 Cowen, 253.

⁵ *Warner v. Griswold*, 8 Wend. 665.

⁶ *Livingston v. Cox*, 5 Pa. 360.

⁷ *Poole v. Gist*, 4 McCord, 259.

services of a particular partner, and he fails to perform them, it is a breach of contract, yet the damages for such breach will be but nominal, if another partner shall perform the duty with due professional skill and without injury to the client. A contract with a firm for the services of a particular partner, at a stipulated fee, cannot be broken by the client upon the death of such partner, without tendering to the survivor a fair compensation for services already rendered, and if the survivor render the services with professional skill and diligence, he is entitled to the entire fee.¹ Where one of a firm of solicitors received from a client a sum of money for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money, the court held that the transaction with the client was within the scope of the partnership business, and that the partners in the firm were jointly and severally liable to make good the amount, and that all the partners were necessary parties to a suit for that purpose.² And, generally, money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business; and, consequently, the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom the money was received.³ And it has been decided in England that a court of equity will grant relief in such a case.⁴

An officer having on an execution against a corporation arrested a person who was supposed to be a member thereof, but who stated that he was not, obtained from the creditor's attorney a promise of indemnity for committing him. It was held that such promise was not illegal. An attorney at law cannot bind his copartner by such a promise; but the partnership is a cir-

¹ *Smith v. Hill*, 8 Eng. Ark. 173.

² *Atkinson v. Mackreth*, 2 Law R. Eq. 570. See *Plumer v. Gregory*, 18 Law R. 621.

³ *Earl of McDonald v. Masterman*, 7 Law R. Eq. 504; *Dwight v. Simon*, 4 La. An. 490; *Wilkinson v. Griswold*, 20 Miss. 669; *Perry v. Clarke*, 5 How. (Miss.) 502; *Butler v. Jones*, 7 *Ibid.* 587.

⁴ *St. Aubyn v. Smart*, 5 Law R. Eq. 183.

cumstance from which, with other circumstances, it may be inferred he intended to act for both, and where the copartner subsequently to the commitment adopted and ratified the promise, it was held the officer maintained an action against them jointly.¹

Where a claim was placed for collection in the hands of two attorneys who were partners, a judgment was obtained, land of the debtor sold under execution, and redemption from the sale by paying the money to the sheriff, who paid it over to one of the attorneys. Prior to the redemption the land copartnership between the attorneys was dissolved, yet both partners were held liable to the client for the money thus received by one partner after the dissolution. So, where a client retains two attorneys who are partners, he is entitled to the services of both until the business is completed, notwithstanding a dissolution pending the business.²

§ 315. Attorney's books.—In an action against an attorney for negligence, the client cannot compel the production of the attorney's books on a mere suggestion of the client's belief that they contain entries relating to the matters complained of. The party must show by affidavit that there is some one document in the possession or power of his adversary, to the inspection of which he is entitled.³

§ 316. Liability for abandonment of suit.—An attorney when employed is bound to conduct a suit to a close, and he cannot recover compensation until the suit is closed; and he is not bound to proceed if his intermediate expenses are not paid.⁴ He is liable if he abandon the suit without reasonable cause and notice. Though the attorney may not be at liberty suddenly to give up his employment, because a client does not on every occasion comply with his demand for money, he may at any time give such notice on any reasonable cause, as the want of funds, dissolution of partnership, or his retirement from business, or

¹ *Marsh v. Gold*, 2 Pick. 284.

² *Smyth v. Harvie*, 31 Ill. 62.

³ *Evans v. Lewis*, 1 Law R. Com. P. 656.

⁴ *Nicholls v. Wilson*, 2 Dowl. N. S. 1031; 12 L. J. Ex. 266; 11 Mees. & W. 106; *Harris v. Osborn*, 2 Crompt. & M. 629; *Whitehead v. Lord*, 7 Ex. 691; *Van Sandan v. Browne*, 9 Bing. 402; 2 Moore & S. 543; 1 D. P. C. 715; *Hobey v. Built*, 2 Barn. & Adol. 350; *Wadsworth v. Marshall*, 2 Crompt. & J. 665.

the insolvency of his client, and may recover his costs for what he has done.¹ The attorney is liable if he make erroneous or negligent statements of any affidavits proper in the case, or as to the truth of pleas in abatement, or to any fact which comes to his knowledge in a professional character.²

§ 317. Other liabilities.—If an attorney contract to collect a debt, he is liable for the negligence of his agents by which the debt is lost. The reason is, that it is a case of specific contract on the part of the attorney, by which he virtually guarantees the collection.³ As to papers, the attorney is not an insurer; but he must exercise toward them such care and diligence as good experts in his department are, under similar circumstances, accustomed to use.⁴

§ 318. Not liable for acts not within the scope of their profession.—Attorneys are not liable for undertakings not implied by their profession, as demanding payment of a note, and giving notice to the indorser.⁵ Nor for failure to file a note which he has received for collection by suit, as a claim against the estate of the maker, upon the death and declaration of the insolvency of the estate of the latter, when the facts occurred after he received the note, and without his knowledge.⁶ Nor for taking notes of third parties, who proved to be insolvent, when the instructions were to do the best he could with the demand, and he supposed them good.⁷ Nor for forbearing to bring a suit where the parties had agreed to leave one of the matters

¹ *Rowson v. Erle*, 1 M. & Meek, 538; *Van Sandan v. Browne*, 9 Bing. 402; S. C. 2 Moore & S. 543; *Wadsworth v. Marshall*, 2 Crompt. & J. 665; *Hobey v. Built*, 3 Barn. & Adol. 350. See *Mordecai v. Solomon*, Sayer, 173; *Menzies v. Rodriguez*, 1 Price, 92; 1 *Id.* 31.

² *Rowbottom v. Duffree*, 5 Dowl. P. C. 557; *Brown v. Austin*, 4 *Ibid.* 161; *Nash v. Swinburn*, 3 Scott N. S. 326; 1 Dowl. N. S. 190; *Lumley v. Foster*, Barnes, 344; *Merrington v. A. Beckett*, 2 Barn. & C. 81.

³ *Wharton on Agency*, sec. 602; *Riddle v. Hoffman*, 3 Pa. 224; *Bradstreet v. Everson*, 72 Pa. 124.

⁴ *Wharton on Agency*, sec. 602; *Riddle v. Hoffman*, 3 Pa. 224; *Bradstreet v. Everson*, 72 Pa. 124; *Reeve v. Palmer*, 5 Com. B. N. S. 91; *North W. R. R. v. Sharp*, 10 Ex. 451; *Wilmouth v. Elkinton*, 1 Nev. & M. 749; *In re Thompson*, 20 Beav. 545.

⁵ *Odlin v. Stetson*, 17 Me. 244; *Hughes v. Boyce*, 2 La. An. 803.

⁶ *Stubbs v. Beene*, 37 Ala. 627.

⁷ *Wright v. Ligon*, 1 Harp. Eq. 166.

in dispute to arbitration, the decision of which would render an action unnecessary.¹

Under a general retainer, an attorney is not bound to take any steps in his client's business not implied by his profession. Under a general employment to collect a note placed in his hands before maturity, it has been held that an attorney is not bound to demand payment from the maker and give notice to the indorser, it not being an undertaking implied. But if the attorney is retained to do a particular act, and is directed at the same time to do whatever is needful in the matter, he is bound to take such steps as have immediate relation to the act for which he is specially retained.²

In England, it is the duty of the attorney to submit to the opinion of counsel all mere questions of law, the forms of pleading, the kind of evidence to be adduced. If he does not, and acts upon his own opinion, he is responsible for the consequences of error committed; while the assistance of counsel generally relieves him from liability,³ as where he is advised by counsel that certain proofs are unnecessary. But in matters peculiarly within the province of an attorney, and a knowledge of which he is presumed to possess, the attorney cannot absolve himself from liability by consulting counsel.⁴

§ 319. Measure of damages.—In actions against attorneys for negligence or wrongs, the debt lost and cost sustained through their negligence furnish, when the action can be maintained, the obvious measure of damages, where this measure definitely exists.⁵ In other cases the plaintiff is entitled to be in the same position as if the attorney had done his duty.⁶ Where an attorney, who had been employed to complete the purchase of leasehold property, which had been bought at auction by his

¹ *Hogg v. Martin*, Riley, 156.

² *Odlin v. Stetson*, 17 Me. 244; *Dawson v. Lawley*, 4 Esp. 65.

³ *Godefroy v. Dalton*, 6 Bing. 460; *Manning v. Wilkins*, 12 Law T. 249; *Hart v. Frame*, 6 Clark & F. 193; *Stevenson v. Rowland*, 2 Dowl. & C. 104.

⁴ *Godefroy v. Dalton*, *supra*; *Goodman v. Walker*, 30 Ala. N. S. 482; *Smallwood v. Norton*, 20 Me. 83.

⁵ *Godefroy v. Jay*, 7 Bing. 413; *Hoby v. Built*, 3 Barn. & Adol. 350; *Langdon v. Godfrey*, 4 Fost. & F. 445; *Simmons v. Rose*—*Re Ward*, 31 Beav. 1; *Governor v. Raley*, 34 Ga. 173; *Nisbet v. Lawson*, 1 Ga. 275.

⁶ *Tatham v. Lewis*, 65 Pa. 65.

client on conditions requiring that the purchaser should take an under-lease and not demand an abstract of the vendor's title, nor inquire into that of the lessor, made no inquiries, but simply got what purported to be a lease executed by the pretended seller, but which recited no title, the pretended seller having none, and the purchaser was evicted by the real owner; it was held that the attorney had been guilty of negligence, for which his estate was liable in damages, the proper measure of which was the sum which the plaintiff, who had bought back the property, was obliged to pay to get the title, with interest and without deduction for rent, as he was liable over for *mesne* profits during the time he had occupied the premises rent-free.¹ But where, owing to the attorney's neglect to charge the judgment-debtor in execution at the proper time, the latter was discharged by *supersedeas*, there being evidence that the judgment-debtor was not wholly insolvent, a direction to the jury to find the whole debt was held erroneous, and their verdict for that amount set aside.² Any fact which will tend to reduce the debt which the attorney failed to collect below the nominal amount, is proper to be considered by the jury.³

Where the declaration alleged that the plaintiff was forced to pay a sum of money by reason of the defendant's negligence, it was held he could not recover for a mere liability to make further payments in addition to what he had actually paid.⁴ An attorney at law executed to a deputy sheriff in the name of the plaintiff an agreement to hold the sheriff harmless for selling certain goods under execution, and from all costs, damages, and expenses whatever resulting or accruing by reason of the sale. In an action by the sheriff against the attorney for falsely representing that he had authority so to execute it, it was held that the jury might consider on the question of damages a judgment recovered against and paid by the plaintiff for taking and selling the property mentioned in the agreement, deducting therefrom so much as consisted of damages resulting from attachments made by the plaintiff after the making of the con-

¹ *Allen v. Clark*, 7 Law T. R. Q. B. 781; S. C. 11 W. R. 304.

² *Russell v. Palmer*, 2 Wils. 325.

³ *Crooker v. Hutchinson*, 2 Chip. 117; *Huntington v. Rumnill*, 3 Day, 388.

⁴ *Jones v. Lewis*, 9 Dowl. Pr. 143; *Howell v. Young*, 5 Barn. & C. 259.

tract, or if that amount could not be ascertained, the rule of damages might be the amount of the judgments in favor of the parties whose names had been signed by the defendant to the contract, and which had been satisfied by the application thereon of the avails of the sale of the property so taken by the plaintiff. The plaintiff was, moreover, entitled to recover the expenses of sundry litigations directly necessitated by the fraud, and proper compensation for his own time and services in the matter, besides interest on his expenses up to the verdict.¹

When an attorney is chargeable with negligence his contract is violated, and an action lies immediately, though only nominal damages could be proved or recovered; but the proof of actual damage may extend to facts growing out of the injury, even up to the day of the verdict.² The attorney who may be chargeable for negligence is liable only to the extent of the injury his client has received, as if he be employed to defend a suit and fail to do so, he is liable to the party injured to the extent of the damages actually suffered: if he can show that the defense he was employed to make was not a good one, he is liable only for nominal damages.³

When an attorney is sued by his client for negligence and unskillfulness he cannot set up champerty in the contract as a defense to the suit; nor be allowed to prove that he consulted a distinguished attorney respecting the proper course to be pursued by him, or that the arrangement made by him was, in the opinion of the witness, the best that could be made for his client's interest.⁴

§ 320. Operation of Statutes of Limitation.—In actions for negligence, the attorney may avail himself of the Statutes of Limitation, and the cause of action accrues at the time of the breach of duty or promise by defendant, and the statute begins to run from that time, and not from the time of the plaintiff's discovery of the breach: as where it was complained that the defendant did not diligently and sufficiently make a search in the

¹ *Jones v. Wolcott*, 2 Allen, 247.

² *Wilcox v. Plummer*, 4 Peters, 172.

³ *Suydam v. Vance*, 2 McLean, 99; *Grayson v. Wilkinson*, 13 Miss. 268.

⁴ *Goodman v. Walker*, 30 Ala. 482.

Bank of England to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed in his character of attorney to do so. The omission to search took place more than the statutory time before the action was brought, although it was not discovered by the plaintiff until within the time. The statute was held a complete defense.¹ So where the plaintiff, in a declaration of assumpsit, stated that he employed the defendant to invest and lay out plaintiff's money in an annuity on a good and sufficient security, which he promised to do, but laid it out in an invalid and fraudulent security, the promise was considered the gist of the action, and the statute regarded as a complete bar, although the action was commenced within the statutory period from the time the act was discovered, and the defendant knew that the security was invalid at the time the annuity was granted.²

In an action on the case against an attorney retained by plaintiff to ascertain whether a warrant of attorney, and freehold and leasehold property to be secured by mortgage, were a sufficient security for £3,000 and interest; but afterwards (the interest to that time having been regularly paid) it was discovered that the warrant of attorney and mortgages were not a sufficient security: it was held that the misconduct or negligence of the attorney constituted the cause of action. The statute began to run from the time when the defendant had been guilty of such misconduct, and not from the time when it was discovered.³

The Statute of Limitations in an action against an attorney for neglect to collect money begins to run from the time the attorney first became liable. Where an attorney gave a receipt for a "note for collection," the statute was held not to have commenced to run in his favor from the date of the note, but from a reasonable time afterward for beginning proceedings. He is allowed a reasonable discretion in the absence of peremptory instructions. What is reasonable depends upon circumstances, and is a question for the jury. Where the duty is immediate, the right of action arises, and the statute begins to run from the attorney's receipt of the money.⁴

¹ *Short v. MacCarthy*, 3 Barn. & Ald. 626.

² *Brown v. Howard*, 4 Moore, 508.

³ *Howell v. Young*, 5 Barn. & C. 259.

⁴ *Rhines v. Evans*, 66 Pa. 195.

CHAPTER XIII.

LIABILITY OF CLIENTS TO ATTORNEYS—COMPENSATION OF ATTORNEYS FOR SERVICES RENDERED—REMEDIES OF ATTORNEYS AGAINST CLIENTS TO RECOVER OR SECURE COMPENSATION—REMEDY BY ACTION—REMEDY BY LIEN.

I.—REMEDY BY ACTION.

- § 321. The Roman *Honorarium*.
- § 322. In the Middle Ages.
- § 323. In England.
 - § 324. Solicitors' fees under the Judicature Acts.
 - § 325. Solicitors' fees in England under agreements.
 - § 326. Bills of cost, under the English system.
 - § 327. Delivery of the bill.
 - § 328. Requisites of the bill.
 - § 329. Propriety of the charges.
 - § 330. Liability to be taxed.
 - § 331. Referring bill to taxation.
 - § 332. Taxation of bill independent of statutory provisions.
- § 333. Compensation in the United States.
- § 334. Compensation under general retainer.
- § 335. Actions for compensation.
 - § 336. Liability of client.
 - § 337. Implied obligation.
 - § 338. Pleading and proof.
 - § 339. Proving retainer—Evidence of employment.
 - § 340. Evidence for plaintiff.
 - § 341. Evidence for defendant.
 - § 342. Attorneys' services—when considered as necessities.
 - § 343. Measure of compensation.
 - § 344. Statute of Limitations.
- § 345. Compensation under special agreement.
 - § 346. Express contract.
 - § 347. Assignment of debt.
 - § 348. Agreement for fixed sum in gross.
 - § 349. Promissory note for services.
- § 350. Contingent or conditional fees.—Champerty.
 - § 351. Contracts held champertous.
 - § 352. Contracts held not champertous.
 - § 353. Maintenance and barratry.
 - § 354. Contingent fee not within the Statute of Frauds.
 - § 355. Right to contingent fee as against attaching creditor.
 - § 356. Contract of indemnity.
 - § 357. Merger of the contract.

- § 358. Death of client.
- § 359. Commissions for collecting.
- § 360. Fraudulent assignments.
- § 361. Measure of damages.
- § 362. Compensation of substitutes.
- § 363. Taking new security for fees pending relation.
- § 364. Making new contracts for fees after retainer.
- § 365. Effect of withdrawal from case.
- § 366. Effect of dismissal of case.
- § 367. Effect of change of attorney.

II.—THE REMEDY BY LIEN

- § 368. Lien of attorney.
- § 369. Two kinds of lien—general and particular.
- § 370. The particular or charging lien.
- § 371. The general lien.
- § 372. The so-called “retaining lien.”
- § 373. Lien on papers.
- § 374. Summary jurisdiction over delivery of papers as affecting the lien.
- § 375. Waiver or loss of the lien.
 - § 376. When superseded.
 - § 377. Collusive settlements.
- § 378. Remedies on the lien.
 - § 379. Equitable interference to protect the lien.
 - § 380. Set-off as against lien.
 - § 381. Appropriation of payments on account.
- § 382. Settlements between the parties as affecting the lien.
- § 383. Liens on partnership debts.
- § 384. Liens on sums awarded.

§ 321. The Roman Honorarium.—From the origin of the relation between attorney and client already touched upon in referring to the Roman patrons and their clients, it will be seen that it was the custom to regard the exertions of the advocate as purely honorary, given gratuitously, and the reward as of a similar nature, in discharge not of a legal obligation but as a debt of gratitude. This was perhaps lest the profession should degenerate into a mean and mercenary calling. But, nevertheless, whatever the theory may have been, it is certain that some of the Roman advocates did charge and demand a pecuniary compensation for their services. This, however, being deemed an abuse, the Cincian law was passed A. U. C. 549, by the tribune M. Cincius Alimentus, and was entitled *De Donis et Muneribus*. The provision in regard to advocates has been recorded by Tacitus in his “Annals” (xi, 5): *nequis ob causam orandam pecuniam donumve accipiat*; that no one shall receive a pecuniary compensation on account of pleading a cause. Besides, the advocates in the time of the Republic were generally

men of high rank and family, and of wealth. The pecuniary reward was often no inducement. Their object was popularity, the obtaining the votes of the people to further their different political and ambitious designs. Free services in the courts of law accomplished this object. The result was a large following and clientage almost entirely under the control of the patron for political purposes. But upon the downfall of the republic all this has changed. The Emperor was the real source of advancement. The profession began to be followed for its emoluments, and the Cincian law became a dead letter. Augustus revived it by prescribing additional penalties, but the temptation was too strong, and the law was again practically disregarded. In the reign of the Emperor Claudius a decree was promulgated limiting the amount of fees to 10,000 sesterces, equivalent in English money to about seventy-five guineas, and advocates were rendered liable to indictment for extortion if they received more. In Nero's time a decree of the senate was passed reviving the Cincian law, and forbidding counsel to take fees at all.¹ Suetonius says, however, that the Claudian law, limiting the amount of fees, was adopted in the same reign.² In the reign of Trajan, owing to the corrupt practices of the Roman advocates in taking fees from both sides, and betraying either as might be most advantageous pecuniarily, a decree of the senate was passed by which parties to an action were obliged to take an oath, before the case came on for trial, that they had neither given nor guaranteed any sum of money to the advocates whom they employed. When the cause, however, was at an end, they were allowed to pay their counsel fees not exceeding the amount fixed by the Claudian law. But this decree seems to have become obsolete. In the time of Quintilian, counsel could not claim fees as a debt, even though they were within the prescribed limits. Quintilian thought that if the state of an advocate's affairs required that he should earn a livelihood, then he should not refuse to take pecuniary rewards for his exertions. "Nor," says Quintilian, "do I see what fairer or more proper mode of getting money can be suggested than by means of a most honorable profession, and from those to whom we have

¹ Tacitus' *Ann.* xiii, 4, 5; Forsyth's *Hortensius*, chap. 9.

² Sueton. *Nero*, c. 17.

rendered the most important services, and who, if they give nothing in return, must have been unworthy of our exertions. And this is not only right, but necessary, since these very exertions, and the time devoted to the affairs of others, prevent counsel from increasing their fortune by other means." "A virtuous advocate, therefore, will not seek to get more than is sufficient for him; and even one whose poverty obliges him to receive fees will not take them as a debt due to him, but receive them as an acknowledgment, being well aware that the obligation is still on his side. For in truth the services of counsel ought not to be sold, nor, on the other hand, go unrewarded."

§ 322. In the Middle Ages.—It has been seen that in Rome a limitation was made upon the amount of fees that might be taken. This continued as long as the Roman Empire existed.¹ Within the prescribed maximum, however, the judge was to determine what was fairly and reasonably due, taking into consideration the nature of the cause, the eloquence of the advocate, and the custom of the court.

Among the capitularies of Charlemagne there were regulations governing the conduct of attorneys; and among these was one to the effect that if they were discovered to be influenced by undue eagerness for money in the causes they undertook, they were to be banished from the society of honorable persons, and virtually disbarred;² but there do not appear to be any rules laid down as to the amount of fees to be received.

In France, by a royal ordinance, in the time of Philip the Bold, in 1274, the honorarium was to be regulated by a regard to the importance of the cause and the ability of the advocate; but in no case was it to exceed thirty livres. If the advocate and client could not agree, the judge who tried the cause was to determine it with due regard to equity.

In 1579, an ordinance was issued by Henry III, known by the name of *Ordonnance de Blois*, which enjoined advocates to put their names to all the papers which they drew up in a cause, and to subscribe the amount of fees they had received, in order that they might be taxed if deemed exorbitant. An attempt

¹ Dig. 50, xiii, 1.

² Cap. vii, tit. 114; Forsyth's *Hortensius*, 366, 367.

to enforce this ordinance was met with violent manifestations of dislike and disobedience on the part of the Paris bar, and the ordinance subsequently fell into disuse and became a dead letter.

§ 323. **In England.**—The rule obtaining in England was stated by Sir John Davy, in his preface to his reports, as follows: “For the fees or rewards which they receive are not of the nature of wages or pay, or that which we call salary or hire, which are indeed duties certain, and grow due by contract for labor or service, but that which is given to a learned counsellor is called *honorarium*, and not *merces*; being, indeed, a gift which giveth honor as well to the taker as to the giver, neither is it certain nor contracted for; for no price or rate can be set upon counsel which is invaluable and inestimable, so as it is more or less according to circumstances, namely, the ability of the client, the worthiness of the counsellor, the weightiness of the cause, and the custom of the country. Briefly, it is a gift of such a nature, and given and taken upon such terms, as, albeit the able client may not neglect to give it, without note of ingratitude, (for it is but a gratuity or token of thankfulness) yet the worthy counsellor may not demand it without doing wrong to his reputation, according unto that moral rule, *Multa honeste accipi possunt, quæ tamen honeste peti non possunt*.”

This continued to be the rule in England. A barrister has no legal right to a fee. The church, however, expressly requires that those who practice in the ecclesiastical courts shall not lose their reward. The 131st canon provides that if any proctor “shall, by any color whatsoever, defraud the advocate of his duty or fee, or shall be negligent in repairing to the advocate, and requiring his advice what course is to be taken in the cause, he shall be suspended from all practice for the space of six months, without hope of being thereunto restored before the said term be fully complete.”

The theory of the English law being that the profession of the advocate is merely honorary, it follows that the advocate's fee does not depend upon or grow out of any contract for labor or service, but is a gift *honorarium*, and that the advocate is incapable of making a contract for the compensation of his services as such;¹ and at the same time the barrister is secure from all

¹ Kennedy v. Brown, 13 C. B. N. S. 677.

actions for want of skill, diligence, or discretion in the *bona fide* discharge of his duties. Having no power to enforce remuneration, the advocate is not subject to the ordinary liabilities of an attorney. What is said, therefore, under these heads, must be understood of the American lawyer, of whatever rank, and of the English attorney, solicitor, or proctor, and not of the English barrister, advocate, or counsel.¹

§ 324. Solicitors' fees under the English judicature acts.—In England, under the Supreme Court of Judicature acts of 1873 and 1875, by rules of court and orders in council, the fees of solicitors are provided for with great particularity. The regulations prescribe the exact fees that may be charged by the solicitor for writs, summonses, and warrants, services, notices and demands, appearances, instructions, drawing pleadings, and other documents, copies, perusals, attendances, and special allowances, as for procuring evidence, attendances at chambers, procuring advice of counsel, inspection of documents, etc., etc. As to all fees or allowances which are discretionary, they may be allowed at the discretion of the taxing officer, who in the exercise of such discretion is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances. The taxation may also on objection and application for review be reconsidered by the taxing officer, and on appeal by the judge.²

§ 325. Remuneration of attorneys and solicitors in England—Agreements—Taxation of amount.—The prohibition against enforcing payments of fees applicable to the English barrister has never applied to the English attorney or solicitor. By the Attorneys' and Solicitors' Act of 1870, thirty-third and thirty-fourth Vict., chap. 28, an attorney or solicitor

¹ *Swinfen v. Chelmsford*, 1 Fost. & F. 619; 5 Hurl. & N. 890; *Perring v. Rebuter*, 2 Moody & R. 429; *Fell v. Brown, Peake*, 96; *Turner v. Phillips*, Id. 122.

² Orders in Council, August 12th, 1875, Order VI.

may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this act contained—provided, that when any such agreement shall be made in respect of business done or to be done in any action at law, or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable, he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement, or to order the agreement to be canceled, and the costs, fees, charges, and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made.

Saving interests of third parties—agreements to exclude further claims.—Such an agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs recoverable from the client by any other person, or payable to the client by any other person, and any such other person may require any costs payable or recoverable by him to or from the client to be taxed according to the rules for the time being in force for the taxation of such costs, unless such person has otherwise agreed; provided that the client who has entered into such agreement shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own attorney or solicitor under the same. Such an agreement shall be deemed to exclude any further claim of the attorney or solicitor beyond the terms of the agreement in respect of any services, fees, charges, or disbursements in rela-

tion to the conduct and completion of the business in reference to which the agreement is made, except such services, fees, charges, or disbursements, if any, as are expressly excepted by the agreement.

Reservation of responsibility for negligence.—A provision in any such agreement that the attorney or solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such attorney or solicitor, shall be wholly void.

Examination and enforcement of agreements.—No action or suit shall be brought or instituted upon any such agreement; but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside, without suit or action, on motion or petition of any person, or the representative of any person, a party to such agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges, or disbursements, in respect of which the agreement is made by the court in which the business, or any part thereof, was done, or a judge thereof; or if the business was not done in any court, then, where the amount payable under the agreement exceeds fifty pounds, by any superior court of law or equity, or a judge thereof; and where such amount does not exceed fifty pounds, by the judge of a county court, which would have jurisdiction in an action, upon the agreement.¹

§ 326. Bills of costs under the English system.—By 6 and 7 Vict. chap. 74, sec. 37, no attorney or solicitor nor his executor, administrator, or assignee, shall commence or maintain any action, or suit, for the recovery of any fees, charges, or disbursements, for any business done by such attorney or solicitor until the expiration of one calendar month after the delivery to the party charged, or sending by the post to or leaving for him at his country-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, which bill is to be either subscribed by the attorney, or by any partner of a firm, either with his own or the firm name, or by the executor, administrator, or assignee; or be in-

¹ 33 and 34 Vict. chap. 28, secs. 4-8.

closed in or accompanied by a letter subscribed in like manner referring to such bill.¹

An attorney's bill may be referred to taxation, though not signed by him, or inclosed in a letter signed by him and referring to it. It is for the judge, to whom application² is made for an order to tax a bill of costs, to decide whether or not such bill contains taxable items.³

An agreement to charge costs only out of pocket does not preclude taxation; nor does an agreement to receive a fixed sum for costs for business thereafter to be done, notwithstanding payment under it; nor does an agreement with an ignorant client, for payment of his bills, taken at a given amount, solely out of the produce of some property, the subject of the suit.⁴

A bill signed by one of two attorneys in partnership thus: "Per self and Robert Owen, James H. Dixon," has been held a sufficient signature.⁵ A solicitor who delivers an unsigned bill is bound by it; but his client may either treat it as a nullity, or waive the want of signature and adopt it, though after such waiver, the client cannot treat the bill as non-delivered.⁶ The

¹ 6 and 7 Vict. chap. 74, sec. 37; 20 and 21 Vict. chap. 77, sec. 96, as to practitioners in Probate Courts; 21 and 22 Vict. chap. 108, sec. 13, as to practitioners in divorce and matrimonial courts; *Parker v. Gill*, 10 Jur. 1096; *In re Strother*, 3 Kay & J. 518; 3 Jur. N. S. 736; 26 L. J. Ch. 695. See *Kernaghan v. Waderson*, 3 Car. Law Rep. 764; *Windsor v. Herbert*, 7 Mees. & W. 375; 9 D. P. C. 237; 5 Jur. 730. In an action on an attorney's bill, by his executor, the court, before the 6 and 7 Vict. chap. 73, had no power to refer the bill for taxation, though it contained taxable items. (*Williams v. Griffith*, 2 Dowl. N. S. 281; 10 Mees. & W. 125.)

² *Young v. Walker*, 16 Mees. & W. 446; *In re Pender*, 2 Ph. 69; 10 Jur. 891. See *Billing v. Coppack*, 1 Ex. 15; 5 Dowl. & L. 126; 16 Law J. Ex. 265.

³ *In re Johnson*, 1 Jur. N. S. 140. See as to what are and what are not taxable bills and taxable items in England: *Smith v. Demies*, 7 Dowl. & L. 78; 5 Ex. 32; 13 Jur. 518; 19 Law J. Ex. 60. *Contra*: *In re Simmons*, 3 Dowl. & L. 156; 2 Dowl. & L. 500; 9 Jur. 227; 14 Law J. Q. B. 41; *In re Andrews*, 17 Jur. 1145; 17 Beav. 510; 23 Law J. Ch. 129; *In re Osborne*, 25 Beav. 353; 4 Jur. N. S. 296; 27 Law J. Ch. 532; *Curling v. Sedger*, 6 Scott, 678; *Sylvester v. Webster*, 9 Bing. 388; 2 Moore & S. 506; 1 D. P. C. 708; *Clark v. Donovan*, 5 T. R. 694; 1 Esp. 137; *Rex v. Collingridge*, 3 Price, 280; *Lethbridge v. Luxmore*, 1 Dowl. & R. 511; 5 Barn. & Adol. 398; *Painter v. Linsell*, 8 Scott, 453; 8 D. P. C. 250; *In re Maris*, 2 Ad. & E. 582; *Presider v. Smith*, 1 W. W. & H. 51; 2 Jur. 205; *Winter v. Payne*, 6 T. R. 645; *Ex parte Prickett*, 1 N. R. 266; *Nicholas v. Hayter*, 2 Ad. & E. 348.

⁴ *In re Ransom*, 18 Beav. 220; *In re Newman*, 30 Beav. 196; *In re Ingle*, 21 Beav. 275; 1 Jur. N. S. 1059; 25 Law J. Ch. 169. See *In re Vann*, 15 Com. B. 341; 3 Com. Law. Rep. 126.

⁵ *Owen v. Scales*, 2 Dowl. N. S. 304; 10 Mees. & W. 657; 6 Jur. 1000; 12 Law J. Ex. 26.

⁶ *In re Gedy*, 14 Beav. 56; 15 Jur. 851; 20 Law J. Ch. 410. See *Allen v. Murphy*, 9 Ir. L. R. 305.

day on which a bill is received is not to be reckoned as one of the days of the month given to the client.¹

§ 327. Delivery of the bill.—As to the delivery of the bill, its sufficiency depends upon the circumstances of each particular case.² Handing the bill to a relation of the party is not sufficient;³ but delivery to the servants of the client at his dwelling-house, has been held to be so.⁴ It is not enough to show it to the party charged and then to take it away again, unless the attorney showing it intends to leave it with the party and merely takes it back at his request.⁵ A delivery to an agent of the client appointed for that purpose is sufficient,⁶ and so is delivery of a bill unsigned, but accompanied by a letter signed by the solicitor and referring to the bill,⁷ and a signed bill headed in the matter of business, but not addressed to any one, but enclosed in an envelope and sent by post to the client.⁸

It is enough to deliver a bill to one of several joint contractors,⁹ and to a solicitor of a corporation who lays it before the managing committee, the defendant being present, to charge the latter as an acting member.¹⁰ A bill in such a case should be delivered, either at the office of the company, or at least to some person who can reasonably be considered to represent the committee.¹¹ An order for the delivery of an attorney's bill may be made by a judge of a different court from that in which the action is brought, although a judge of the latter court is attending in chambers at the time such order is made.¹² An at-

¹ *Blunt v. Haslop*, 2 D. P. C. 982.

² *Gridley v. Austen*, 16 Q. B. 504; 13 Jur. 680; 18 L. J. Q. B. 337.

³ *Ibid.*

⁴ *McGregor v. Keily*, 2 Dowl. & L. 635; 3 Ex. 794; 18 Law J. Ex. 391.

⁵ *Phipps v. Danbury*, 2 Lown. M. & P. 180; 16 Q. B. 514; 20 Law J. Q. B. 273.

⁶ *In re Bush*, 8 Beav. 66.

⁷ *In re Bush*, 8 Beav. 66; *Taylor v. Hodgson*, 3 D. & L. 115; 10 Jur. 355; 14 Law J. Q. B. 310. See *Champ v. Stokes*, 6 Hurl. & N. 683; 7 Jur. N. S. 607; 3 Law J. Ex. 242.

⁸ *Roberts v. Lucas*, 11 Ex. 41; 1 Jur. N. S. 527; 24 Law J. Ex. 227; 3 Com. Law Rep. 987.

⁹ *Maut v. Smith*, 4 Hurl. & N. 324; 28 Law J. Ex. 234. See *Bland v. De Burgh*, 6 Com. B. 623; 6 Dowl. & L. 412; 5 Rail. C. 361; 12 Jur. 1005; 18 Law J. Com. P. 2.

¹⁰ *Eggington v. Cumberlege*, 1 Ex. 271; 5 Rail. C. 113; 11 Jur. 932; 16 Law J. Ex. 283. See *Edwards v. Lawless*, 5 Rail. C. 357; 6 Dowl. & L. 105; 6 Com. B. 329; 17 Law J. Com. P. 293; *Spyer v. Bernard*, 8 Law T. N. S. 396; *Champney v. Peck*, 1 Stark. 404.

¹¹ *Ibid.*

¹² *Bennett v. Dean*, 4 M. & G. 638. See *Tanner v. Lea*, 4 M. & G. 617; 5 Scott N. R. 237.

tachment will not be granted against an attorney for disobedience to a rule of court ordering him to deliver his bill within a time named, unless a demand is first made of him for his bill, by one of the persons to whom he is ordered to deliver it.¹

An action does not lie against an attorney for disobedience of the order of a judge for delivery of his bill of costs. An attachment in such case is the proper remedy.² On motion for an attachment for non-delivery of an attorney's bill to a party pursuant to rule of court, the affidavit should be made by the party himself; that of a third person is insufficient.³

The intention of the statute was said to be to give the client due time to examine the charges made by the attorney, and to take advice upon them. Showing a copy was held not sufficient; a copy must have been left before an action could be brought upon it.⁴ The statute also required that the bill signed by the attorney should be delivered to the party personally, or left at his dwelling-house or last place of abode. Delivery at a counting-house was not, therefore, sufficient.⁵ But leaving it at the defendant's last apparent place of abode was sufficient.⁶ Where an attorney is retained jointly by several parties to defend a suit against each, the delivery of a bill to *one* is sufficient to entitle him to maintain a joint action against all, for his costs, within the provisions of the statute.⁷

A party having changed his attorney, an order was obtained by the second attorney for the delivery of a bill signed by the

¹ *In re Catlin*, 6 Dowl. & L. 566; 7 Com. B. 136; *In re Baster*, 7 Dowl. & L. 296.

² *Dent v. Bosham*, 9 Ex. 467; 2 C. L. R. 989; 18 Jur. 295; 23 L. J. Ex. 161.

³ *Potter v. Back*, 8 D. P. C. 872. To the point that an attorney may set off a claim for costs notwithstanding no signed bill has been delivered, see *Brown v. Tibbits*, 11 Com. B. N. S. 855; 31 Law J. Com. P. 206; 10 Week. R. 465; 6 L. T. N. S. 385; *Harrison v. Turner*, 10 Q. B. 482; 11 Jur. 817; 16 Law J. Q. B. 295; *Jeffreys v. Evans*, 3 Dowl. & L. 52; 14 Mees. & W. 210; 14 Law J. Ex. 363.

When an attorney has been retained for and undertaken a particular business, his bill of costs for carrying that business through to its conclusion is but one bill. (*Stokes v. Trumper*, 2 Kay & J. 232.)

⁴ *Brooks v. Mason*, 1 H. Bl. 290; *Crowder v. Shee*, 1 Camp. 437. See *Chamneys v. Peck*, 1 Stark. 404.

⁵ *Hill v. Humphreys*, 2 Bos. & P. 343; 3 Esp. 254.

⁶ *Wadeson v. Smith*, 1 Stark. 324.

⁷ *Oxenham v. Lemon*, 2 Dowl. & R. 461.

Delivery to the attorney of the party to be charged is sufficient if the party himself attend the taxation, or the bill be shown to have come to his hands. (*Warren v. Cunningham*, 1 Gow. 71.)

first attorney under the statute, which delivery was made to the second attorney in the cause. This was considered a sufficient delivery to the party to be charged, so as to enable the first attorney to bring his action against the client for the amount of such bill.¹ If a bill has been delivered to a deceased client it is not necessary, in order to maintain an action against his personal representative, to deliver another.² A mistake in the date of items in an attorney's bill which does not mislead, does not vitiate the delivery of the bill.³ If part of an attorney's demand be for money advanced to his clients, and the remainder for business done, he cannot, under the English system, recover, unless a bill be delivered; nor can he divide his demands at the trial and recover for the money advanced.⁴

§ 328. Requisites of the Bill.—A bill must show in what court the business was done, and the name of every suit in which the business charged for or the greater part of it was done,⁵ and each item charged for transacted. It should be an entire thing, and if the same bill blends charges for work done in a court of equity with charges for work apparently done in a court of common law, without designating which, the client cannot judge or be advised whether he should refer the whole bill for taxation; and the charges in the same bills for equity business, though correctly stated, cannot be recovered. The bill must give sufficient materials for obtaining advice as to taxation. Where a bill contains items applicable to proceedings in the superior courts, but does not contain any statement from which it can be inferred in which of those courts the business was transacted, the bill is to be presumed to be a compliance with the statute, unless the party charged thereby proves that any further information was practically required for the purpose of taxation, or

¹ *Vincent v. Slaymaker*, 12 East, 372.

² *Reynolds v. Caswell*, 4 Taunt. 193.

³ *Williams v. Barber*, *Ibid.* 806.

⁴ *Benton v. Garcia*, 3 Esp. 149.

⁵ 6 and 7 Vict. chap. 73; *Englehart v. Hart*, 15 Mees. & W. 548; 4 Dowl. & L. 60; 15 Law J. Ex. 312; *Ivinney v. Marks*, 16 Mees. & W. 843; 4 Dowl. & L. 109; 11 Jur. 355; 17 Law J. Ex. 165; *Martindale v. Falkner*, 2 Dowl. & L. 600; 2 Com. B. 706; 10 Jur. 161; 15 Law J. C. P. 91; *Duries v. Wright*, 8 Com. B. 831; 7 Dowl. & L. 292; 19 Law J. C. P. 137; *Sargant v. Gannon*, 7 Com. B. 742; 6 Dowl. & L. 691; 18 Law J. C. P. 220.

shows that the name of the court in which business was done would have been of use to him.¹

A bill of costs appears to be sufficient if it gives such information as would enable the client to obtain advice as to the taxation of the bill; and it is not necessary that an attorney, whom the client may consult as to the expediency of having the bill taxed, should be able to say, without further inquiry, whether the charges are fair and reasonable. Where a bill contains items for proceedings such as would take place in the superior courts, it is not necessary that it should show in which of those courts the business took place. The omission sufficiently to specify one or more items does not disentitle an attorney from recovering that portion of the bill which is unobjectionable.² But the sixth and seventh Vict., chap. 73, sec. 37, in requiring that a signed bill of costs should be delivered previously to an action by an attorney, means a bill so drawn out that all the items are charged in a taxable shape.³

§ 329. Propriety of charges.—Although the master has no jurisdiction to determine whether acts done by the attorney were useful, he may determine what were necessary.⁴ Where, in a bill of costs, several charges of a discretionary nature were entered, some too low and some too high, the latter of which the master reduced to their proper amount, but refused to raise the former, the court refused to review the taxation.⁵ The master has no jurisdiction to disallow items on the ground that in respect of the business to which they refer the attorney was guilty of negligence.⁶ An attorney will not be allowed, on taxation of costs, to charge for more than one letter before action.⁷

¹ *Cooke v. Gillard*, 1 El. & B. 26; 17 Jur. 137; 22 Law J. Q. B. 90; *Keene v. Ward*, 7 Dowl. & L. 334; 13 Q. B. 515; 14 Jur. 65; 19 Law J. Q. B. 46.

² *Haight v. Ousey*, 3 Jur. N. S. 634; 26 Law J. Q. B. 17; 7 El. & B. 578. But see *Pigott v. Codman*, 1 Hurl. & N. 837; 26 Law J. Ex. 134.

³ *Philby v. Hazle*, 8 Com. B. N. S. 647; 7 Jur. N. S. 125; 29 Law J. C. P. 370.

See, as to what bills have been held sufficient, *Keene v. Ward*, 7 Dowl. & L. 34; 13 Q. B. 515; 14 Jur. 65; 19 Law J. Q. B. 46; *Cosens v. Graham*, 12 Com. B. 398; 16 Jur. 952; 21 Law J. Com. P. 206; *Anderson v. Boynton*, 7 Dowl. & L. 25; 13 Q. B. 308; 14 Jur. 14; 19 Law J. Q. B. 42.

⁴ *Williams v. Nicholas*, 1 Dowl. N. S. 841; *Matchett v. Parker*, 9 Mees. & W. 767; 1 Dowl. N. S. 924; *Heald v. Hall*, 2 Dowl. P. C. 163.

⁵ *Eyre v. Shelley*, 8 Mees. & W. 154; 5 Jur. 439.

⁶ *Matchett v. Parker*, *supra*.

⁷ *Capel v. Staines*, 2 Mees. & W. 850; 5 D. P. C. 770; M. & H. 265; 1 Jur. 740.

When there are matters in a bill which have no relation to business as an attorney, as money advanced to the client, the master, upon reference to him, should strike those items out and proceed to tax the rest;¹ but items of the costs taxed in two actions and paid by the attorney, and for which he had received no specific payment from his client, are properly inserted in the bill, and need not be in the cash account.² When attorneys bring an action to recover the amount of their signed bill of costs, which bill contains some items which they are not entitled to recover, the action may be maintained for the residue.³ The items may be amended or altered on petition, omitted items may be supplied, and those undercharged increased; but an alteration of a bill referred for taxation cannot be made after it is brought in for taxation, except by consent.⁴

In England, after an attorney's bill has been delivered a month, and no application has been made to have it taxed, the client will not be permitted to question the reasonableness of the items before a jury.⁵ At a trial, the allowance of items in a bill by the master on the taxation is *prima facie* evidence that those items so allowed had been performed by the attorney.⁶

In an action on an attorney's bill, when there is evidence of a general retainer, the judge will not allow the bill to be taxed in detail by the jury: although particular heads or items of charge, not necessarily arising out of the retainer, may be disallowed *in toto*, as not having been authorized by the client.⁷

¹ Wardle v. Nicholson, 1 N. & Mev. 335; 4 Barn. & Adol. 469.

² Harrison v. Ward, 4 D. P. C. 39; 1 Har. & W. 353. See Oppenshaw v. Whitehead, 9 Ex. 384; 2 Car. Law Rep. 553; 23 Law J. Ex. 97. See, as to what items have been allowed, Maddison v. Bacon, 5 Bing. (N. C.) 246; 7 Scott, 207; 3 Jur. 248; Broadhurst v. Darlington, 2 D. P. C. 38; Ex parte Quick, 2 Scott, 184; 1 Hodges, 202; In re Tilleard, 23 Law J. Ch. 765; 11 Week. R. 764; 8 L. T. N. S. 587. As to what items have been disallowed, Jones v. Roberts, 2 D. P. C. 374; 4 Tyr. 310; Leaver v. Whalley, 2 D. P. C. 80; Bucknall v. Boybell, 7 Scott, 171.

³ Pilgrim v. Hirschfelt, 9 L. T. N. S. 288; 11 Week. R. 51.

⁴ In re Whatley, 20 Beav. 576; Davis v. Dysart, 21 Beav. 124; 1 Jur. N. S. 1153; 25 Law J. Ch. 122-322; In re Catlin, 18 Beav. 519.

⁵ Williams v. Frith, 1 Doug. 189; Hooper v. Till, 1 Doug. 198; Anderson v. May, 2 Bos. & P. 237; 3 Esp. 167.

⁶ Whalley v. Glover, 3 Car. & K. 13.

⁷ Dunn v. Hales, 1 Fost. & F. 144. See as to interest on costs in England, 23 and 24 Vict. chap. 127, sec. 27; Berrington v. Phillips, 4 D. P. C. 578; 1 Gale, 404; 1 Mees. & W. 48; May v. Bigginden, 24 Beav. 207; Lyddon v. Moss, 4 De Gex & J. 104; 5 Jur. N. S. 637; Carter v. Carter, 8 L. T. N. S. 692.

§ 330. Liability to be taxed.—It has been held in England that if an attorney introduce into his bill certain items connected with his professional capacity, though not immediately within the terms of the statute, and in action upon the bill fail because it was not properly delivered, according to the directions of the statute, he must fail together, and he will not be allowed to recover for such items only.¹

Many charges, however, which are not taxable in themselves, become taxable when included in a bill containing taxable items. It is also settled, at least in England, that where a bill contains one item, which is a proceeding in court, all the residue of a bill, though it be a bill merely for conveyances, is taxable.² So, in chancery, if any part of a solicitor's bill relates to business done in chancery, the whole is subject to taxation.³ Costs and disbursements paid by an attorney out of his own pocket are taxable.⁴

§ 331. Referring bill to taxation.—The court has no power to refer a bill of costs for taxation, when such bill has been paid more than twelve calendar months before the application has been made to the court to refer. The application to tax must be made within twelve calendar months after payment; but under special circumstances the court has ordered

¹ *Winter v. Payne*, 6 Durn. & East, 645; *Hill v. Humphreys*, 2 Bos. & P. 343; *Thwaites v. Mackerson*, 1 Mood. & M. 199; 3 Car. & P. 341.

² 2 Taunt. 322.

³ *Margerum v. Sandiford*, 3 Br. C. C. 233.

⁴ *Peake* 102; 1 Camp. 437. As to what have been held taxable items in an attorney's bill, under the English practice, see *Lethbridge v. Luxmore*, 1 Dowl. & R. 511; S. C. 5 Barn. & C. 898; *Watt v. Collins*, 1 Ryan & M. 284; 2 Car. & P. 71; *Winter v. Payne*, 6 Durn. & E. 645; *Rex v. Collingridge*, 3 Price, 280; *Rex v. Partridge*, 1 Tidd's Pr. 330; *Collins v. Nicholson*, 2 Taunt. 321; *Ford v. Webb*, 2 Brod. & B. 241; *Ex parte Prickett*, 1 New Rep. 266; *Wilson v. Gotteridge*, 4 Dowl. & R. 737; 3 Barn. & C. 157; *Weld v. Crawford*, 2 Stark. 538; *Ex parte Williams*, 4 Durn. & E. 496; *Clark v. Donovan*, 4 Ibid. 594; *Smith v. Wattleworth*, 4 Barn. & C. 364; 6 Dowl. & R. 510; Tidd's Pr. 330; 1 Car. & P. 615; *Fearne v. Wilson*, 6 Barn. & C. 86; 9 Dowl. & R. 157; *Hazard v. Lane*, 3 Mer. 285. What not taxable items, *Hillier v. James*, 1 Barnes, 37; *Green v. Hassel*, Say. Rep. 233; *Fenton v. Correa*, 3 Car. & P. 45; 1 Ryan & M. 262; *Williams v. Odell*, 4 Price, 279; *Burton v. Chatterton*, 3 Barn. & Ald. 486; 2 Stark. 522; *Prothero v. Thomas*, 1 Marsh, 539; 6 Taunt. 196; *Ex parte Dann*, 9 Ves. 547; *Ex parte Wheeler*, 3 Ves. & B. 21; *Ex parte Fearow*, 5 Ves. 633; *Ex parte Partridge*, 2 Mer. 500.

bills to be taxed twelve months after they have been delivered. By the word "payment" is meant a payment in money; not by bill of exchange or promissory note.¹ To obtain an order for taxation of a bill of costs which has been paid, it must be shown that there has been undue pressure and overcharge, or overcharge amounting to fraud.²

The mere fact that an action is pending upon an attorney's bill does not give a judge or the court jurisdiction to refer the bill for taxation after the lapse of a year, without special circumstances. The special circumstances under which a judge may by 6 and 7 Vict. chap. 73, sec. 37 refer an attorney's bill for taxation after verdict, must in general be circumstances newly come to the knowledge of the party, and upon learning which he must apply promptly to the court.³ When a party does not apply for the taxation of a bill of costs within a month after the bill is delivered, but waits till an action is brought against him, and then makes terms and obtains time from his attorney, these are such special circumstances as will induce the court not to refer a bill for taxation.⁴ Where a bill is paid in order to obtain possession of deeds, and an intention is at the same time expressed to have the bill taxed, an order will be made to refer it to taxation.⁵

As in case of payment, it is also held that to entitle a client to an order of taxation, after the expiration of twelve months from its delivery, he must show either pressure or gross overcharge, amounting to what a court of equity designates as fraud.

¹ *In re Harris*, 1 Dowl. & L. 1018; 13 Mees. & W. 3; 8 Jur. 453; 13 Law J. Ex. 259; *Bemis v. Hey*, 1 Dowl. & L. 661; 7 Jur. 1154; 13 Law J. Q. B. 28; *Ross v. Wilton*, 7 Jur. 1133; 13 Law J. Q. B. 17. See *In re Dearden*, 9 Ex. 210; 17 Jur. 993; 23 Law J. Ex. 14.

² *In re Foster*, *Ex parte Walker*, 6 Jur. N. S. 687; 29 Law J. Ch. 625. See *Ex parte Tosland*, *In re Letts*, 31 Beav. 488; 8 Jur. N. S. 1119; 32 Law J. Ch. 100; 11 Week. R. 15; 7 L. T. N. S. 307. See *In re Harrison*, 10 Beav. 57; 11 Jur. 197. *Contra*, *In re Deardon*, 17 Jur. 993.

Where a bill has been delivered and security given for the amount, that is equivalent to payment for the purpose of precluding taxation without special circumstances. (*Ex parte Turner*, 5 De Gex; Macn. & G. 540; 24 Law J. Ch. 71.)

³ *In re Whicher*, 13 Mees. & W. 549; 2 Dowl. & L. 407; 14 Law J. Ex. 78; *Cowdell v. Neate*, 1 Com. B. N. S. 332; 2 Jur. N. S. 1248; 26 Law J. Com. P. 37.

⁴ *In re Wilton*, 13 Law J. Q. B. 17; *Ross v. Wilton*, 7 Jur. 1133.

⁵ *In re Deardon*, 17 Jur. 993; 9 Ex. 210; 23 Law J. Ex. 210.

But it is not necessary to show both ; and where an application by a residuary legatee to tax a bill of costs of the solicitors of the executors, after payment, no case of pressure or actual fraud being made out, nor of very gross overcharge, but various items were of a considerably greater amount than would have been allowed to the executors in a suit to administer the estate, it was held that taxation had been rightly ordered, on the ground that overcharges of this nature were overcharges amounting to fraud within the technical meaning of the term.¹

The rule in courts of law, that before an attorney's bill is settled and paid it may be taxed as of course, but not as of course after payment has been acquiesced in, also prevails in equity.² The general rule is that an attorney's bill which has been delivered for the purpose of creating a capacity of bringing an action cannot be taxed at the trial or after verdict, but, under special circumstances, the court will refer it for taxation. If it be shown by affidavit that the business has not been done, or that the charges are fraudulent, neither payment of the money, nor a release, nor a judgment for the demand, nor a warrant of attorney to confess judgment, will preclude taxation in such cases. Neither will length of time, nor a settlement, nor security given for the bills, if the client can point out gross errors and charges amounting to imposition and fraud. There are cases where the court has ordered the taxation of an attorney's bill after eight,³ seventeen,⁴ and twenty-one years, and an actual security given, and even after security and payment.⁵

¹ In re Dickson, 3 Jur. N. S. 29; 26 Law J. Ch. 89. See as to English practice in proceedings to tax an attorney's bill, Reg. Gen. Q. B. C. P. and Ex. H. T. 16 Vict. E. 66; 1 El. & B. App. 13; Bassett v. Giblett, 2 D. P. C. 650; In re Payne, 5 Com. B. 407; Neale v. Postlethwaite, 8 D. P. C. 100; Goodland v. Frankland, 2 D. 1 N. S. 975; 7 Jur. 671; 12 Law J. Q. B. 249; Evans v. Taylor, 2 D. P. C. 349; In re Wilton, 13 J. Q. B. 17; 7 Jur. 1133; Jones v. Roberts, 2 D. P. C. 656; 4 Tyrw. 310; Barradaile v. Nelson, 2 C. L. R. 740; 14 Com. B. 655; 18 Jur. 431; 23 L. T. C. P. 159; Ex parte Cooper; 14 Com. B. 663; Gillow v. Ryder, 15 Com. B. 729; 3 C. L. R. 263; Tucker v. Neck, 4 Bing. (N. C.) 113; 6 D. P. C. 239; 3 Hodges, 242.

² Langstraff v. Taylor, 14 Ves. 262.

³ Aubrey v. Popkins, Dick. 403.

⁴ Drapers' Co. v. Davis, 2 Atk. 295.

⁵ Cook v. Settree, 1 Ves. & B. 127; Langstraff v. Taylor, 14 Ves. 262.

Where the charges were *prima facie* exorbitant, a bill of costs was ordered to be taxed, after payment made, and after the death of the assignee who had paid

The rule, it is held, should not be carried too far, so as to prevent attorneys from undertaking and carrying on long and expensive suits. Every case is to be considered in the light of its own circumstances, and where nothing appears but a trifling inaccuracy, the court will not set aside a security, though given by the client while the business was depending.¹ So the taxation of a solicitor's bill was refused after a security given and after payment and acquiescence, where some of the charges, though improper, were not so gross as to amount to fraud.²

§ 332. Taxation independent of statutory provisions.

—The courts have jurisdiction to refer an attorney's bill for taxation, independent of any statute, and although no cause is pending. But it is not always that the court will exercise such jurisdiction, and probably it is not of course, but the application must be made to the court, and the circumstances under which its interference is claimed must be stated.³

§ 333. In the United States.—In Pennsylvania, the English rule, that counsel could not sue for compensation, was once in vogue, but afterwards rejected as a rule of law.⁴ In New Jersey the rule has obtained,⁵ and also to some extent in the federal courts, as applied to counsel in the special sense of that term.⁶ But in Delaware, Florida, Kentucky, Massachusetts, New York, Pennsylvania, Ohio, South Carolina, Texas, Vermont, Tennessee, Missouri, and other States, it has been expressly decided that counsel as well as attorneys have an undoubted right to recover their fees by action.⁷

it. (Ex parte Neal, 1 Buck. 111; *Balme v. Paver*, 1 Jac. 305; 1 Madd. Ch. 116; *Walmesley v. Booth*, 2 Atk. 30; *Penderpleath v. Frazer*, 3 Ves. & B. 176; *Lewis v. Morgan*, 3 Austr. 769; *Crossley v. Parker*, 1 Jac. & W. 460.)

¹ *Cook v. Settree*, 1 Ves. & B. 126; 1 Madd. Ch. 117.

² *Penderpleath v. Frazer*, 3 Ves. & B. 174; *Grillin v. Leyburne*, 1 Term Rep. 407.

³ *Williams v. Odell*, 4 Price, 279; *Anon.* 2 Chit. 155; *Lee*, Ex parte *Smith*, 5 Ves. 706; *Bignold v. Bignold*, 11 Ves. 328.

⁴ *Lynch v. Commonwealth*, 16 Serg. & R. 368; *Gray v. Brackenridge*, 2 Pa. 75; *Foster v. Jack*, 4 Watts, 334; *Balsbaugh v. Frazer*, 19 Pa. 95; *Mooney v. Lloyd*, 5 Serg. & R. 412, (A. D. 1819) overruling *Brackenridge v. McFarland*, Addis. 49 (A. D. 1793).

⁵ *Seeley v. Crane*, 3 Green, 35; *Van Alta v. McKinney's Exrs.* 1 Harris, 235.

⁶ *Law v. Ewell*, 2 Cranch C. C. 144.

⁷ *Baird v. Ratcliff*, 10 Tex. 81; *Carter v. Bennett*, 6 Fla. 214; *Webb v. Brown-*

In Pennsylvania, it was also held that an attorney could not recover for his fees, without an express promise, anything beyond the sum provided in the fee-bill.¹ Other cases took the ground that the honorary character of the fees of barristers secured a shadowy distinction, but yet was beneficial in effect; that it contributed to preserve the idea of profession of a class which belonged to the public, in the employment and remuneration of which no law interferes.² But the rule was departed from as a question of law even in Pennsylvania, and the early decision overruled; and the current of decisions in other States is also to the effect that an attorney or counsellor may recover for the full amount of his fees.³

So in the absence of express contract, the attorney or counselor in America and the attorney or solicitor in England is entitled to recover from those who employ him in his profession whatever his services are reasonably worth; and the performance of such services at the instance or with the consent of the person about whose business they are rendered, implied an assumption to pay for them *quantum meruit*. The question was fully and ably discussed in *Adams v. Stevens*, 26 Wend. 452, by Chancellor Walworth as follows:

ing, 14 Mo. 354; *Foster v. Jack*, 4 Watts, 334; *Gray v. Brackenridge*, 2 Pa. 75; *Stevens v. Monges*, 1 Harris, 127; *Duncan v. Breithaupt*, 1 McCord, 149; *Clendinen v. Black*, 2 Bail. 488; *Christy v. Douglas*, Wright, 485; *Rust v. Larue*, 4 Litt. 411; *Stevens v. Adams*, 23 Wend. 57; 26 Ibid. 451; *Wilson v. Burr*, 25 Ibid. 386; *Wallis v. Loubat*, 2 Denio, 607; *Merrett v. Lambert*, 10 Paige, 352; *Lynch v. Willard*, 6 Johns. Ch. 342; *Brigham v. Foster*, 7 Allen, 419; *Ames v. Gilman*, 10 Met. 239; *Thurston v. Percival*, 1 Pick. 415; *Buckland v. Conway*, 16 Mass. 346; *Briggs v. Georgia*, 10 Vt. 68; *Vilas v. Downer*, 21 Vt. 419; *Balsbaugh v. Frazer*, 19 Pa. 95; *Caldwell v. Shepherd*, 6 Mon. 389; *Newman v. Washington*, Mart. & Y. 79.

¹ *Mooney v. Lloyd*, 5 Serg. & R. 416.

² *Seeley v. Crane*, 3 Green (N. J.) 35; *Shaver v. Norris*, Pen. (N. J.) 63; *Van Alter v. McKinney's Exrs.* 1 Har. 236.

³ *Gray v. Brackenridge*, 2 Pa. St. 181; *Foster v. Jacks*, 4 Watts, 33, 337; *Stevens v. Adams*, 23 Wend. 57; S. C. 26 Ibid. 451; *Newman v. Washington*, Mart. & Y. 79; *Stevens v. Monges*, 1 Harr. 127; *Bayard v. McLane*, 3 Ibid. 217; *Duncan v. Besithaupt*, 1 McCord, 149; *Downing v. Major*, 2 Dana, 228; *Christy v. Douglas*, Wright's Ch. R. 485; *Webb v. Hepp*, 14 Mo. 354; *Vilas v. Downer*, 21 Vt. 419; *Lecatt v. Salles*, 3 Porter, 115; *Easton v. Smith*, 1 E. D. Smith, 318; *Webb v. Browning*, 14 Mo. 353.

The bar of Paris may recover their fees by suit, yet they regard it as dishonorable, and those attempting it are often stricken from the rolls. We believe a somewhat similar feeling exists in Philadelphia, if not throughout Pennsylvania. (1 Dupin Profession d'Avocat, 110, 699.)

“Blackstone lays it down as the established law of England that a counsellor cannot sustain a suit for his fees, and he cites for this purpose the case of *Moor v. Rowe*, 1 Rep. in Ch. 38, in the time of Lord Coventry, 1639, where a demurrer was allowed to a bill, brought by a counsellor against a solicitor, for counsel fees, which the latter had agreed to account for periodically. He also refers to the decree of the emperor Claudius, mentioned by Tacitus, limiting the amount of gratuity which the advocate should be permitted to receive. * * * I am not aware of any case in which it has been definitely decided, even in England, that a barrister cannot recover upon an express contract to pay him a specific sum for his services as counsel; but in the case of *Turner v. Phillips*, 1 Peake's N. P. C. 123, in which Lord Kenyon expressed the opinion that money paid to a barrister for his services could not be recovered back, he mentioned it as the general opinion of the profession that the fees of barristers and physicians were as a present from the client or the patient, and not a payment or compensation of services. It was on this principle, I presume, that he decided the case of *Fell v. Brown*, Id. 96, where he held that an action would not lie against a barrister for gross negligence in conducting the cause of his client.

“The rule for considering the services of barristers as gratuitous merely, and not entitling them to any legal claim to compensation, is supposed to have been derived from the civil law. But as I understand that law, the advocate might recover upon an *express* promise to pay his honorary fee, although there was no *implied* promise arising merely from the relation of advocate and client. Among the early institutions of Rome, when the relation of patron and client existed between the patrician and the plebeian, the patron, who had accepted the promise of fidelity from his client, was bound to render him advice and assistance, and to sustain him in his litigations, without any other fee or reward than that which the client was bound to render him at all times in virtue of his general relation of client. The relation which existed between them was similar to that of parent and child, or rather that of master and slave. But in the progress of society, when the relations of patron and client towards each other had totally changed, when the business of advocating causes in the courts had become a profession, and before the

credit system pervaded all the relations of life, the client paid his advocate a fee in advance for his services, which was called a gratuity or present.

“As this was a mere honorary recompense, the client was under no legal obligation to pay it. But the result necessarily was, that if the usual present was not given, the advocate did not consider himself bound in honor to undertake the advocacy of the cause before the courts. Afterward, Marcus Cincius Alimentus, a tribune of the people, procured the passage of the law known as the Cincian law, prohibiting the patron or advocate from receiving any money or other present, for any cause; and annulling all gratuities or presents made by the client to the patron or advocate. But as no penalty was prescribed for the breach of this law, it of course became a dead letter. The emperor Augustus afterward re-enacted the Cincian law, and prescribed penalties for its breach. But towards the end of his reign the advocates were again authorized to receive fees or presents from their clients. The emperor Tiberius also permitted them to receive such forced gratuities. This led to the abuse referred to by Tacitus, and induced the senate to insist upon the enforcement, or rather the re-enactment, of the Cincian law, or rather the law limiting the amount of the fees of advocates, as referred to by Blackstone (lib. 3, p. 29, n. 12). Nero revoked the law of Claudius, which was subsequently re-enacted by the emperor Trajan, with the additional restriction that the advocate should not be permitted to receive his fee until the cause was decided. (1 *Dupin, aine*, 39.) The younger Pliny mentions a law not referred to by Dupin, which authorized the advocate, after the pleadings in the cause had been made, and the judgment had been given, to receive the fee which might be voluntarily offered by the client, either in money or a promise to pay. (See Merlin, art. *Honoraires*.) Erskine, in his ‘Institutes of the Law of Scotland,’ understands the law in the Digest, *De extraordinariis cognitionibus*, as authorizing a suit for the fee of an advocate, without a previous agreement for a specific sum. (2 Ersk. Inst. [by McAllen] 695.)

“Whatever may have been the case in Rome itself, it is settled by the law of Scotland, where the civil law prevails, that an action may be sustained on a promise to compensate an advo-

cate for his services. (See Stair's Inst. by Brodie, b. 1, tit. 12, art. 5, and note *b*; 2 Bell's Law. Dict. tit. Fees; Ersk. Inst. b. 3, tit. 3, art. 32; McKenzie v. Burntisland, Mor. Dict. of Decis. 11,421.) * * * *

"It appears also to be the law of France that the advocate may recover his fees by suit. (*Sirey, Recueil Generale de Lois*, tom. 22, pt. 2, p. 141.) But it seems to be considered dishonorable by the Parisian bar to bring suits for counsel fees; and those who should attempt to do it would be immediately stricken from the roll of advocates. (1 *Dupin, aines, Prof. d'Avocat*, 110, 698.)

"Whatever may be the practice of other countries, however, the principle has never been adopted in this State that the profession of counsellors is merely honorary, and that they are not of right entitled to demand and receive a fair compensation for their services, especially where there is an agreement to pay them a fixed compensation, or such a reasonable remuneration for their services as those services shall be deemed worth. The distinctions of patron and client, which formed one of the fundamental laws of ancient Rome, ceased in this State when slavery was abolished; and it is wholly inconsistent with all our ideas of equality to suppose that the business or profession by which one earns the daily bread of himself or his family is so much more honorable than the business of other members of the community as to prevent him from recovering a fair compensation for his services on that account. I have no doubt, therefore, that by the law of this State, as it has always existed from the time of its first settlement, the lawyer was entitled to recover a compensation for his services, and that such services were never considered here as gratuitous and honorary merely."¹

§ 334. Compensation under general retainer.—The attorney is generally entitled to compensation for all services rendered in good faith and in a proper manner.² In the absence of express contract, they are entitled to what the services are reasonably worth. When more than one attorney is employed, the presumption is that they share the fee equally, in the ab-

¹ Adams v. Stevens, 26 Wend. 452-5.

² Hallett v. Oakes, 1 Cush. 296.

sence of proof to the contrary.¹ If there is any statute fixing a rate of compensation, the law implies a promise on the part of a client to pay his attorney at least the statute rate of compensation. The burden of proving that the attorney undertook to perform the services for a less rate, or without charge, rests upon the client; and such an agreement should be made out by evidence equal to a positive declaration.² As clients are bound to make fair and reasonable compensation to their counsel, it is fraud upon the latter for a client to settle a suit without his knowledge, to withhold fees, and then set up the Statute of Limitations.³ When a demand is given an attorney for collection, there is no agreement implied on his part that he will, in the first instance, look to the demand as a means of satisfying his claim, or that he will wait for his pay until it be determined whether it is collectable or not.⁴

Besides being entitled to a retaining fee, generally, for his services in a particular suit, an attorney has also a right to claim a proper compensation on being retained or required not to act or advise professionally adversely to the person so retaining him; or he may be retained to act generally in all cases and matters in which the other is interested.⁵

If an attorney be employed at a stipulated fee, or be dismissed without fault of his own, before judgment, he is at least entitled to payment for the services already rendered, if not to the stipulated fee.⁶ If an attorney neglects to furnish his client with a statement of his extra expenses in the suit beyond the amount recovered of the adverse party, the amount recovered will be presumed to be all he has any right to claim.⁷ A demand by an attorney upon his client for a certain sum as compensation, is only a proposition to receive that amount for the debt; and if payment is refused, the recovery cannot be limited to the amount demanded, if the services are shown to be of greater value.⁸ An

¹ *Hurst v. Durnell*, 1 Wash. 438.

² *Brady v. Mayor*, 1 Sand. 569.

³ *Lichty v. Hugus*, 55 Pa. 435.

⁴ *Nichols v. Scott*, 12 Vt. 47.

⁵ 9 Casey, 442; *Lecatt v. Sallee*, 3 Port. 115; *Webb v. Browning*, 14 Mo. 354.

⁶ *Myers v. Crockett*, 14 Tex. 257.

⁷ *Matter of Blakeley*, 5 Paige, 311.

⁸ *Miller v. Beal*, 26 Ind. 234. But see *Succession of Flower*, 3 La. An. 292; *Ingersoll v. Morse*, 33 Miss. 667.

account rendered by an attorney to his client containing his charges for professional services, if retained without objection becomes an account stated, and draws interest from the time when it was rendered. But interest is not allowed on an unliquidated running account for which no time of payment is fixed.¹ On an issue between attorney and client as to the value of the former's services in a suit in which the latter was plaintiff, and which was settled without a trial, the opinion of the counsel of the defendant in such suit that the plaintiff therein had no case is competent evidence. If by their clients' authority attorneys have retained counsel, and promised to pay him out of the proceeds of the suit, and he holds them responsible under this agreement, and the proceeds of the suit have come to their hands, it is too late for the client to forbid them to pay the counsel. An attorney retained in a suit is entitled to a reasonable retainer without any special contract therefor.²

Where an attorney engages to institute and prosecute a suit for a stipulated percentage out of the money or property realized thereby, if his client assigns the claim which was the foundation of the suit to a creditor who takes the claim with express reference to the rights of the attorney, and with the understanding that he shall pay the fees of the attorney before applying any of the proceeds to his own debt, a trust is thereby created, and a duty imposed upon the assignee to satisfy the prior claim of the attorney; and in such a case the jurisdiction of a court of equity is complete.³

And where there is a special contract between an attorney and his client for a stipulated fee, and the attorney, after rendering a part of the services contracted for, is prevented by any cause, not within his control, from rendering the rest, he may recover for the part performance on a *quantum meruit*. Where attorneys, who are employed under a special contract to prosecute a suit, abandon the cause before its termination, they are thereby deprived of any claim under the contract, and are left to recover such fees and compensation as they are reasonably

¹ Case *v. Hotchkiss*, 1 Abb. N. Y. App. 324; *Hadley v. Ayres*, 12 Abb. Pr. N. S. 240. See *Mygatt v. Wilcox*, 45 N. Y. 306.

² *Aldrich v. Brown*, 103 Mass. 527.

³ *Morgan v. Roberts*, 38 Ill. 65.

entitled to, on the basis of a *quantum meruit*.¹ And on the same principle, where an attorney at law engages to defend a cause for a specific sum and dies before the cause is determined, his administrator may recover from the client the amount which the intestate's services were really worth to him. The recovery cannot, however, exceed the contract price, or the rate of it for the part of the service performed.²

This principle was affirmed in *Major v. McLester*, 4 Ind. 591, where it was held that an attorney was entitled to recover on a *quantum meruit* an amount equal to the benefit received by the defendant from his services, not exceeding the amount agreed upon for an entire performance of the contract. The same principle was upheld in *Clendinen v. Black*, 2 Bail. S. C. 488, where a note was given for a solicitor's fee, and he dying soon after, it was held that his representatives might recover whatever his services were reasonably worth up to the time of his decease. An attorney who contracts to attend to certain suits, or accepts a general retainer for a fixed, stipulated sum, and who dies before the business to which he is attending has been disposed of, is entitled (by his representatives) to a compensation such as his services were reasonably worth, which may be recovered on a *quantum meruit*.³

A employed two attorneys to collect a decree in A's favor of \$500, and agreed in writing to pay them for their services \$150 of the decree, when they should collect the same. The attorneys having received \$200, refused to pay it to A upon demand, whereupon A discharged the attorneys, employed another attorney to collect the decree, and brought an action for money had and received against the former attorneys for the \$200 collected. They pleaded the general issue. The court held, that if the contract was in force, that the attorneys were not entitled to compensation until the decree was fully collected. Also, that if the contract was broken and rescinded, the claim of the attorneys could only be for reasonable compensation for services rendered, with damages, perhaps, for the breach of contract. Further, that such compensation and damages could not be de-

¹ *Morgan v. Roberts*, 38 Ill. 65.

² *Coe v. Smith*, 4 Ind. 79.

³ *Baylor v. Morrison*, 2 Bibb, 103.

ducted in this suit, as no special plea, notice, or counter claim was filed, but the general issue simply pleaded.¹

§ 335. Compensation — Actions for.—An attorney may obtain by suit compensation for services rendered. The principle of the English law that counsel or barristers cannot recover by suit compensation for their services has no application in the United States.² And it makes no difference as to the right whether the services were successful or not. To make out the defense that the attorney undertook to perform the services for little or no compensation, requires proof of an express contract so to do.³ And it has been held a fraud for the client to settle a suit without the counsel's knowledge, to withhold fees, and then set up the Statute of Limitations.⁴ The attorney may of course recover from his client his reasonable expenses in and about the litigation.⁵

If ill success, however, is attributable to the lawyer's negligence or bad faith, then he cannot recover.⁶ But negligence or ill faith in one matter will not, it is held, deprive him of compensation in another. Perhaps it might, however, if damages were pleaded as a set-off.⁷ The attorney cannot recover when the service rendered was the maintenance of a procedure either

¹ *Pruit v. Miller*, 3 Ind. 16; *Scobey v. Ross*, 5 Ind. 445.

² *Wharton on Agency*, sec. 615; *Law v. Ewell*, 2 Cranch C. C. 144; *Wylie v. Coxe*, 15 How. 416; *Smith v. Davis*, 45 N. H. 566; *Nichols v. Scott*, 12 Vt. 47; *Clendinen v. Black*, 2 Bail. 488; *Miller v. Beal*, 26 Ind. 234; *Webb v. Browning*, 14 Mo. 353; *Sanford v. Ruckman*, 24 How. Pr. 521; *Stevens v. Monges*, 1 Har. (Del.) 127; *Van Atta v. McKinney*, 16 N. J. L. 235; *Foster v. Jack*, 4 Watts, 339; *Harland v. Lilienthal*, 53 N. Y. 438; *Rush v. Cavanaugh*, 2 Pa. 187; *Brackett v. Sears*, 15 Mich. 244.

³ *Brady v. Major*, 1 Sand. 559.

⁴ *Lichty v. Hugus*, 1 Pa. 434.

⁵ *Hayward v. Fiott*, 8 Car. & P. 59; *Grissell v. Robinson*, 3 Barn. & C. 10; 3 Scott, 329; 2 Hodges, 138; *Helps v. Clayton*, 17 Com. B. N. S. 553; *Baker v. Merryweather*, 2 Car. & K. 737; *Campion v. King*, 6 Jur. 35.

⁶ *Wharton on Agency*, sec. 615; *Learson v. Darrington*, 32 Ala. 227; *Maynard v. Briggs*, 26 Vt. 94; *Nixon v. Phelps*, 29 Vt. 198; *Bradin v. Kingland*, 4 Watts, 420; *Brackett v. Norton*, 4 Conn. 517; *Gleason v. Clark*, 9 Cowen, 57; *Runyan v. Nichols*, 11 Johns. 547; *Hopping v. Quin*, 12 Wend. 517; *Porter v. Ruckman*, 38 N. Y. 210; *Wills v. Kane*, 2 Grant Pa. 60; *Fletcher v. Winter*, 3 Fost. & F. 138; *Stokes v. Trumper*, 2 Kay & J. 232.

⁷ *Currie v. Cowles*, 2 Bos. 542. See *Walsh v. Shuman*, 65 Ill. 471.

illegal or immoral.¹ Nor can a lawyer recover for absolutely useless work.²

Actions for attorneys' fees should be brought in the name of the person directly employed or retained.³ If the work was performed by a partnership, then all the plaintiffs should be duly qualified attorneys.⁴ It has been held that where only one of the firm is an attorney of the court where the business is done, the suit cannot be maintained in the name of the firm.⁵ The action should always be brought against the party retaining the attorney. If a party for whose benefit the attorney's services are required authorize another to retain an attorney for him, this is tantamount to a direct retainer by the principal; but if the third party, acting only under a general authority, employ and instruct the attorney, the third party only and not the principal can be sued.⁶ So where one attorney does business for another, the attorney employed generally looks to the attorney who employs him and not to the client. If the attorney employing another wishes to escape personal responsibility, he must give express notice that the business is to be done on the credit of the client; and it is no defense that the business was

¹ *Treat v. Jones*, 28 Conn. 334; *Hallett v. Oakes*, 1 Cush. 296; *Arrington v. Sneed*, 18 Tex. 135; *Trist v. Child*, 27 Wall. 441.

² *Hill v. Featherstonhaugh*, 7 Bing. 569; S. C. 5 Moore & P. 541; *Shaw v. Arden*, 9 Bing. 287; 2 Moore & S. 341; *Huntley v. Bulwer*, 8 Scott, 325; 6 Barn. & C. 111; *Brady v. Carter*, 12 Ad. & E. 373; *Symes v. Nepper*, 12 Ibid. 337.

³ See *Pinley v. Bagnall*, 3 Doug. 155, where the plaintiff, an attorney was clerk to another attorney, and by arrangement entitled to the benefit of the common-law business transacted in the office, it was held that he was entitled to sue a client for common-law business transacted for him in such office, though no personal retainer was given to the plaintiff. So a member of a law firm may sue in his own name for a demand due the firm, if the business from which it arose was conducted in his name solely. (*Platt v. Halen*, 23 Wend. 456.) But the other party, or defendant, may set off a demand against the firm. (*Lansing v. McKil-lup*, 7 Cowen, 416.) The employment of an attorney to conduct a cause is a personal trust and confidence; it cannot be delegated except by consent of the client. (*Hitchcock v. McGee*, 7 Port. 556; *Johnson v. Cunningham*, 1 Ala. 249. See also, *Briggs v. Georgia*, 10 Verm. 68; *Matter of Bleakley*, 5 Paige, 311.)

⁴ *Williams v. Jones*, 5 Barn. & C. 108.

⁵ *Arden v. Tucker*, 1 Moody & R. 191; S. C. 5 Car. & P. 258; *Holt v. Vincent*, 4 Taunt. 452; *Latham v. Hyde*, 1 Crompt. & M. 128. Where an attorney carried on business under the firm of A. & Son, but the son was not a partner, but acted as clerk to the father, at a salary, it was held that A might maintain an action in his own name for a bill of costs for business done. (*Kell v. Nainby*, 10 Barn. & C. 205; *Moody & R.* 76.)

⁶ *Ambrose v. Rose*, Skin. 217; 2 Show. 421.

known by the plaintiff to be done for the benefit of the client.¹

In some cases of services performed by an attorney payment of costs by custom devolves on some other one than the party otherwise to be sued, as in cases of loans on mortgages, where, though the costs ultimately fall on the mortgagor, the mortgagee's attorney cannot sue him for the amount.²

In England, the remedy of an attorney for his costs, aside from his lien, is either by action or attachment. If the bill has been taxed he may choose either; if not, he is confined to his action. The action may be either debt or assumpsit—it is usually the latter.³ It does not seem to have been settled whether an attorney or solicitor could support a bill in equity for his bill of costs. It has been objected to such a bill that there is full and effectual relief at law, the relief being merely the payment of a sum of money. But in the case of a bill by a clerk in court against a solicitor, to which there was a demurrer on the ground that the suit was an attempt to give a jurisdiction to the court of chancery which was unusual and unnecessary, Lord Chancellor Eldon overruled the demurrer.⁴

An *indebitatus assumpsit* lies in favor of an attorney who is retained by one person for another. But the employer must promise to pay, and the action is on the express promise against

¹ Serace v. Whittington, 2 Barn. & C. 11.

² Rigley v. Dakin, 2 Younge & J. 83, 150. As to what in the way of compensation for costs, etc., an attorney may or may not recover, see Breckenridge v. M'Farlane, Addis. 49; Gray v. Breckenridge, 2 Pa. 75, overruling Mooney v. Lloyd, 5 Serg. & R. 412; Foster v. Jack, 4 Watts, 334; Stevens v. Monges, 1 Harding, 127; Delaware Ins. Co. v. Gilpin, 1 Binn. 501; Duncan v. Yancy, 1 McCord, 149; Downing v. Major, 2 Dana, 228; Gay v. Capers, 1 Comst. 198; Lecatt v. Sallee, 2 Port. 115; Morgan v. Currie, 3 Marsh, 294; Rankin v. McDowell, 2 Marsh, 621; McLain v. Williams, 8 Yerg. 230; Rush v. Larue, 4 Litt. 417; Caldwell v. Shepard, 6 Mon. 392; McWilliams v. Hopkins, 1 Whart. 276; Hopping v. Quinn, 12 Wend. 517; Clendinnen v. Black, 2 Bail. 488; McFarland v. Crary, 8 Cowen, 253; McDonald v. Page, Wright, 121; Hopewell v. Amwell, 2 Halst. 4; Christy v. Douglass, Wright, 485; Scott v. Elmendorf, 12 Johns. 315; Brady v. Mayor, etc., 1 Sand. 569; Satterlee v. Frazer, 2 Sand. 141; Merritt v. Lambert, 10 Paige, 352; Wallis v. Lambert, 2 Denio, 607; Wilson v. Burr, 25 Wend. 386; Van Alta v. McKinney, 1 Hardr. 235; Stevens v. Adams, 23 Wend. 57; S. C. 26 Wend. 451; Davis v. Downer, 10 Vt. 529; Webb v. Browning, 14 Miss. 353; Hall v. Washington Co. 2 Greene, 473; 1 Mann. (Mich.) 461.

³ Thursby v. Warren, Cro. Car. 159; Milyard's Case, 1 Mod. 118.

⁴ Barker v. Dacie, 6 Ves. 681. See, also, Parry v. Owen, Amb. 109; Atk. 740; Anon. Mosely, 178; Raneleigh v. Thornhill, 1 Vern. 202; Norris v. Bacon, 1 Vern. 312.

the person making it,¹ and under the Statute of Frauds it must generally be in writing.²

§ 336. Liability of client.—In an action on an attorney's bill against two, it is not sufficient to prove a joint employment and a joint promise to pay after the delivery of the bill, but it must be shown that the business was done for the joint benefit.³ In attempting to fix liability upon clients for the acts of their attorneys there must be some evidence of a retainer.⁴

If an attorney in conducting a cause does not communicate to his client an offer of compromise made by the other party, but proceeds with a view to obtain further compensation, he cannot afterwards charge his client with the costs incurred. But as it is the duty of an attorney to communicate such offers, the presumption is that he does so until the contrary is proven.⁵

If an attorney has reasonable and probable grounds for commencing an action, and does so, but afterwards desists from prosecuting it because he afterward discovers that the cause cannot be successfully proceeded with, he is entitled to recover his costs from his client.⁶ If an administrator employs counsel to manage a suit pending against his intestate at the time of the latter's death, he becomes personally liable for the counsel fees.⁷

The contract of an attorney retained to conduct an action is continuing, and, as a general rule, can be determined by him

¹ *Ambrose v. Rose*, 2 Show. 421; *Skin*, 217; *Sands v. Trevilian*, Cro. Car. 107.

² *Stark*, 270.

³ *Hellings v. Gregory*, 10 Moore, 337; 1 Car. & P. 627.

⁴ *Crook v. Wright*, R. & M. 278.

⁵ *Still v. Thomas*, 8 Car. & P. 762.

⁶ *Lawrence v. Potts*, 6 Car. & P. 428. See as to liability for drawing leases, *Webb v. Rhodes*, 3 Bing. N. C. 732; 4 Scott, 497; 3 Hodges, 138; *Baker v. Merryweather*, Car. & K. 737. See *Campion v. King*, 6 Jur. 35. For drawing marriage settlements, *Hayward v. Fiott*, 8 Car. & P. 59; *Grissel v. Robinson*, 3 Phill. (N. C.) 10; 3 Scott, 329; 2 Hodges, 138; *Helps v. Clayton*, 17 Com. B. N. S. 553; 10 Jur. N. S. 1148; 34 Law J. C. P. 1. See generally as to liability of client, *Gray v. Waiteman*, 7 Moore, 467; *Becke v. Penn*, 7 Car. & P. 397; *Parker v. Robinson*, 7 *Ibid.* 241; *Dupen v. Keeling*, 4 Car. & P. 102.

⁷ *Livermore v. Rand*, 26 N. H. 85. One wishing to be appointed a sequestrator, employed an attorney to conduct the proceedings. The petition was signed by others, some of whom spoke to the attorney, and requested him to press the proceeding; but this, it was held, did not bind the others to pay counsel fees. *Cook v. Mackrell*, 70 Pa. 12.

only on reasonable notice.¹ He cannot generally sue for his bill until the termination of the suit; he may, however, give a reasonable notice to his client to supply him with adequate funds, and in case of refusal he may sue him for his costs.² And if a client repudiates his retainer of an attorney to conduct a suit, the latter is entitled to bring an action for his costs, without waiting the final result or completion of the suit.³

An attorney, properly qualified and practicing as such, in the absence of a statutory provision, or of a rule of court prohibiting it, can recover for services rendered upon the employment of a client, although he may not have been formally admitted to practice in the court where the services were rendered. Even if there be a statute or rule prohibiting such a recovery, unless there has been a formal admission, yet if the services are rendered by a firm, one of whom is duly admitted, the partners may recover in a joint action for such services.⁴

An attorney has no legal claim upon a husband for services and disbursements in defending his wife against a suit brought by him for divorce. The only mode of securing payment by the husband in such case is by an order of court for a sufficient allowance for the purpose.⁵

§ 337. Implied obligation.—An instruction that “where there is a general employment for an agreed service of an attorney, that employment extends until the final termination of the case in the court of last resort, and no additional sum can be charged for services rendered, unless there is an express agreement to pay for the same,” is erroneous. It ignores the fact of any further implied obligation.⁶ Where a co-defendant in a suit, being an attorney, specially contracted with his co-de-

¹ *Nicholls v. Wilson*, 2 Dowl. N. S. 1031; 11 Mees. & W. 106; 12 Law J. Ex. 266; *Harris v. Osborn*, 2 Car. & M. 629; 4 Tyr. 445.

² *Whitehead v. Lord*, 7 Ex. 691; 21 Law J. Ex. 239; *Van Sandan v. Browne*, 9 Bing. 402; 2 Moore & S. 543; *Hoby v. Built*, 3 Barn. & Ad. 350; 1 D. P. C. 715; *Wandsworth v. Marshall*, 2 Crompt. & J. 665; *Coppinger v. Lynnot*, 3 Ir. C. L. R. 563.

³ *Hawks v. Cottrell*, 27 Law J. Ex. 369; 3 Hurl. & N. 243.

⁴ *Harland v. Lilienthal*, 53 N. Y. 438; *Arden v. Tucker*, 4 Barn. & Ad. 815; *Turner v. Reynall*, 14 Com. B. N. S. 328.

⁵ *Cooke v. Newell*, 40 Conn. 596; *Shelton v. Pendleton*, 18 Conn. 421.

⁶ *Bartholomew v. Langsdale*, 35 Ind. 278.

defendants in the action, for a stipulated sum, to defend the suit in behalf of himself and his co-defendants, he to employ and pay assistant counsel, the assistant counsel called into the case by the attorney, and who performed valuable services in the defense of the case with the knowledge of the other defendants, and without any knowledge on their part of the special contract existing between said attorney and his co-defendants, were, in an action against all the defendants, held entitled to recover compensation for the services rendered by them in the defense of the suit.¹

§ 338. Pleading and proof.—In an action for an attorney's bill of costs, it seems strictly necessary only to adopt the common counts for work and labor, etc., though it is usual to describe the plaintiff as an attorney, and to state that he did the work in that character. Thus, "for work before that time done as an attorney and solicitor, and materials for the same provided by the plaintiff for the defendant, and otherwise, upon his retainer, and at his request, in and about the prosecuting, defending, and soliciting of divers causes, suits, and business for the defendant, and for divers journeys and attendances performed and given in and about that work by the plaintiff, for the defendant, and at his request, and for fees due and payable to the plaintiff in respect thereof, and for other the work and labor of the plaintiff, by him done and performed, in and about drawing, copying, and engrossing divers conveyances, deeds, and writings for the defendant, and also for divers journeys and attendances before that time performed and given in and about the business of the defendant, at his request," with common counts on an account stated, and for money paid and disbursed, etc.

The plaintiff must, under the general issue, if pleaded, prove his retainer or employment by the defendant, and the performance of the work for which the charges are made, and that those charges are reasonable. The plaintiff should also prove all facts the onus of which is cast upon him by the pleadings, as under the plea of the Statute of Limitations, that the busi-

¹ McCrary v. Ruddick, 33 Iowa, 521.

ness charged was done within the statutory time, or was only completed within that time.¹ And when want of qualification is pleaded, he must show his admission,² and compliance with the law, when non-compliance is pleaded.³ In other cases, where the defense is a special agreement, maintenance, champerty, or illegality, the burden of proof is on the defendant, and it is sufficient for the plaintiff to make out his *prima facie* case as indicated above.⁴

Matters of special defense should be specially pleaded by the defendant, as the Statute of Limitations,⁵ the want of a legal qualification,⁶ or that the subject-matter of the services was illegal.⁷ The defendant may also pay money into court, and plead the same in the ordinary way.⁸

Although the retainer need not, in ordinary cases, be in writing, however desirable,⁹ still full proof of the retainer is generally required. So it is held that the mere delivery of papers to an attorney by a party, with an intimation from the latter that he was entitled to an estate, and would pay the attorney if he recovered it, is insufficient to entitle the attorney to recover the costs of an ejectment brought for the estate; nor will an attorney be entitled to recover costs for professional services performed in the character of trustee for a party, unless express provision to that effect is made in the trust deed.¹⁰ In actions against more than one defendant it is not enough to prove a

¹ *Martindale v. Falkner*, 2 Com. B. 706; *M'Dowell v. Potter*, 8 Barr. 187; *Ambrose v. Rose*, 2 Show. 421.

² See *Rex v. Crossley*, 2 Esp. 526; *Jones v. Stevens*, 11 Price, 251; *Pearce v. Whale*, 5 Barn. & C. 39.

³ *Beck v. Mordaunt*, 2 Bing. N. C. 140; 4 Dowl. 112; *Robinson v. Rowland*, 4 Dowl. 271.

⁴ *Pearce v. Whale*, 5 Barn. & C. 38; 7 Dowl. & R. 512.

⁵ *Oliver v. Thomas*, Ld. Raym. 2; *Martindale v. Falkner*, 2 Com. B. 706. See *Hill v. Allen*, 2 Mees. & W. 283; *Runyan v. Nichols*, 11 Johns. 547; *Orcutt v. Pettit*, 4 Denio, 233; *Guy v. Gower*, 2 Marsh. 273.

⁶ *Humphreys v. Harvey*, 1 Bing. N. C. 62; *Williams v. Jones*, 2 Q. B. 276.

⁷ See *Flight v. Leman*, 4 Q. B. 883; 12 Law J. Q. B. 353; *Pechell v. Watson*, 8 Mees. & W. 691; *Peate v. Dicken*, 1 Crompt. M. & R. 422; 3 Dowl. 171.

⁸ *Stevenson v. Berwick*, 1 Q. B. 154.

⁹ *Ante*, sec. 185; *Osborn v. Bank*, 9 Wheat. 738. See *Hotchkiss v. Leroy*, 9 Johns. 142; *Burghart v. Gardner*, 3 Barb. 64; *Briggs v. Georgia*, 15 Vt. 71; *Smith v. Lyford*, 11 Shep. 147; *St. Albans v. Bush*, 4 Vt. 58; *Kellogg v. Morris*, 5 Eng. 18; *Cochran v. Newton*, 5 Denio, 482.

¹⁰ *In re Sherwood*, 3 Beav. 338; 10 Law J. N. S. Ch. 2; *Gilbert v. Dyneley*, 1 Scott, N. S. 364; *Cochran v. Newton*, 5 Denio, 482.

joint employment, and a joint promise to pay; but it is also necessary to show that the business was done on their joint account and joint retainer.¹

In actions against defendants for the amount of a bill of costs incurred on behalf of a third party, it is usually necessary to prove a guarantee in writing, under the Statute of Frauds, but not if the party sued rendered himself personally liable by retaining the attorney in his own name;² and a husband has been held liable for the amount of a bill of costs incurred in proceedings against him on behalf of his wife, rendered necessary by his ill usage of her.³ And so where a female party to a suit in equity married while the proceedings were pending, the husband was held liable for his proportion of the bill, although there was no original retainer by him;⁴ and a retainer to commence a suit which abates is evidence of a retainer to commence another action.⁵ The plaintiff must prove the performance of the work charged for, and that the charges are reasonable. Where the defendant has had an opportunity of taxing the plaintiff's bill of costs, a bill having been delivered, he will be precluded at the trial from objecting to the reasonableness of the charges;⁶ but otherwise the requisite evidence must be given by some competent person.⁷

When an attorney sues upon a *quantum meruit* for professional services, his professional standing is a proper subject of inquiry as affecting the value of his services. And the amount of his professional business may be inquired into as tending to show his professional standing.⁸ Evidence to show the nature and importance of the controversy in which the services were

¹ *Hellings v. Gregory*, 10 Moore, 337; 1 Car. & P. 627; *Fawcett v. Weathall*, 2 Car. & P. 305; *Starving v. Cousins*, 1 Gale, 159. But see *Davis v. Downer*, 10 Vt. 529; *Seeley v. Crane*, 3 Green, 35.

² *Ambrose v. Rose*, 2 Show. 421; *Skin*, 217; *Sands v. Trevilian*, Cro. Car. 194; *Wilson v. Burr*, 25 Wend. 386. See *Noel v. Hart*, 8 Car. & P. 230; *Howes v. Martin*, 1 Esp. N. P. C. 161.

³ *Shepherd v. Mackoul*, 3 Cowp. 326; *Williams v. Fowler*, 1 McClel. & T. 269.

⁴ *Gray v. Wainman*, 7 Moore, 467.

⁵ *Cook v. Wright*, 1 Russ. & M. 278.

⁶ *Williams v. Faith*, 1 Doug. 198; *Anderson v. May*, 2 Bos. & P. 237.

⁷ See *Scott v. Elmendorf*, 12 Johns. 315; *Hughes v. Mulvey*, 1 Sand. 92; *Brady v. Mayor*, 1 Sand. 569; *Price v. McGee*, 1 Brev. 455; *Gleason v. Clark*, 9 Cowen, 57; *Mumford v. Hawkins*, 5 Denio, 355.

⁸ *Phelps v. Hunt*, 40 Conn. 97; *Robbins v. Harvey*, 5 Conn. 335.

rendered, what results depended upon it in other matters, and how other matters affected it and increased its gravity, is proper upon the question of the value of the services. When an attorney is called as an expert to speak of the value of professional services, the court may reject questions put to the witness, upon cross-examination, as to the income derived by him from the practice of his profession. Such testimony has not so direct a bearing upon the question of the capacity of the witness to speak as an expert as to entitle the defendant to the question.¹

The attorney is not required to swear to every paper drawn or served, and how much it is worth. It is enough for him to prove in general terms the proceedings in a cause, the time occupied in the performance of any part of the services by which their value was enhanced, and the value of the whole or in detail as he may elect. The value of the services may be proved by the opinions of attorneys, founded partly on their personal knowledge of the services, and partly upon the testimony of the plaintiff and others personally acquainted with them. The value of the property involved in a litigation is a legitimate subject of inquiry and proof. The plaintiff may himself testify as to the value of his services.²

In cases of employment by public bodies, except corporations, the individuals actually giving the instructions are often the only persons liable for attorney's costs and fees. Sometimes the attorney will be able to look only to the funds for remuneration, and is precluded from suing any individual.³ Where a question was not as to the personal liability of any of the parties, but as to the validity of an attorney's claim for the costs of business done for a town corporation, a resolution of the town council passed generally, authorizing certain proceedings, was held a sufficient retainer of the attorney without any formal or express resolution authorizing the particular steps taken in the case.⁴

¹ *Harland v. Lilienthal*, 53 N. Y. 438. The delivery of a bill appears to have the effect of preventing the attorney from recovering more than is charged therein for the items included in it. It is also said to afford strong presumptive evidence against additional items; but errors or omissions may be corrected or supplied. (*Loveridge v. Botham*, 1 Bos. & P. 49.)

² *Garfield v. Kirk*, 65 Barb. 464; *Beekman v. Platner*, 15 Barb. 550; *Lewis v. Trickey*, 20 Barb. 387.

³ *Reg. v. Lichfield*, 10 Q. B. 534; 16 Law J. N. S. 333.

⁴ *Reg. v. Lichfield*, 10 Q. B. 534; 16 Law J. N. S. 333.

§ 339. Proving retainer—Evidence of employment.—

An attorney cannot recover for professional services unless he can show in some way that he has been employed as such. The fact that his services in managing a cause are as beneficial to another party as to his own client, will not raise an *assumpsit* against such other party,¹ unless the services are accepted by the latter, and it was understood he was to be also liable.² But the employment may be established by circumstances as well as by direct retainer,³ as by recognition by the party as his attorney.⁴ So, if a counsellor at law, having in his hands papers necessary to be used in the defense of a suit, enters upon that defense in the presence of the party for whom he appears, and retains the papers without objection, such facts are evidence of a retainer and promise to pay for his services, as well upon the particular occasion of the first appearance as afterward.⁵

So where an attorney, who was employed by his client in the prosecution and defense of many suits, gave a voluntary appearance for him in a new suit brought against him upon a subject connected with suits then pending. About the time of serving this appearance the attorney told him that he had appeared for him, and he expressed no dissent; it was held that the attorney's appearance was not unauthorized, but under such facts he might well assume a retainer.⁶

The party employing an attorney or counsel to perform any service in his professional capacity, in the absence of a special agreement to the contrary, is personally responsible for any such services rendered. The general rule is, that the party employed looks to the employer for payment, and where a trustee employs an agent in the execution of his trust, such agent must look to the person employing him, individually, for his payment, and can have no claim on the trust fund. Whether the employer

¹ *Chicago Bank v. Larned*, 26 Ill. 218; *Roselins v. De la Chaise*, 5 La. An. 482; *Cooly v. Cecile*, 8 Ibid. 51; *Michon v. Gravier*, 11 Ibid. 596; *Turner v. Myers*, 23 Iowa, 391; *Campbell v. Kincaid*, 3 Mon. 566; *Webb v. Browning*, 14 Mo. 354.

² *Savings Bank v. Benton*, 2 Met. (Ky.) 240.

³ *Hoad v. Ware*, 34 Ga. 328. See *Graves v. Lockwood*, 30 Conn. 276; *DeWolf v. Strader*, 26 Ill. 225; *Dorsey v. Goodenow*, *Wright*, 120; *Smith v. Lyford*, 24 Me. 147; *Ealer v. McAllister*, 19 La. An. 29; *Barker v. York*, 3 La. An. 90.

⁴ *Hotchkiss v. Leroy*, 9 Johns. 142; *Burghart v. Gardner*, 3 Barb. 64.

⁵ *Goodall v. Bedel*, 20 N. H. 205. But see *Seeley v. North*, 16 Conn. 92.

⁶ *Bogardus v. Livingstone*, 7 Abb. Pr. 428.

had or had not authority to make an agreement with the attorney, is immaterial; that is a question between him and the *cestuis que trust*.¹ The natural presumption of law is, that an action commenced by a regular responsible attorney is authorized; and under ordinary circumstances the appearance of a member of the bar as an attorney of record in the place where the party resides would be evidence, as between the attorney and client, of his having been retained in a case in which he had conducted the suit.² It is sufficient evidence of an employment as an attorney in a suit, if the client makes affidavit to the truth of the answer which the attorney has drawn, especially if the attorney has been recognized by the attorney of the other side as counsel in the suit.³ And the delivery of notes to an attorney for collection, by the cashier of a bank, is a sufficient retainer so as to bind the bank for costs incurred upon them.⁴

A son brought a replevin suit in his own right for a horse, executing a bond upon which his mother was surety. The case was appealed to the District Court, and an attorney was there employed by the son to assist in the trial. Judgment being there rendered against the plaintiff and his mother as surety on the bond, he employed the attorney to commence a suit in equity in his own and his mother's name to restrain the collection of the judgment, in which plaintiffs failed; whereupon they appealed to the Supreme Court. It appeared that the attorney had never seen the mother; that she never personally requested him to perform any services for her; but that she knew of the proceedings. The attorney sought to charge her with the payment of his fees, which the court disallowed, saying: "When it appears that an attorney commenced a suit in the name of the principal and surety without being requested by such surety to perform any services for her, the single fact that she knew of his proceedings will not make her liable for his services. The express contract with the son and his primary liability, in the absence of other proof, justify the conclusion that the son and not the mother was the one to whom the attorney was to look for his pay.

¹ *Bowman v. Tallman*, 27 How. Pr. 212. ³ *Hood v. Ware*, 34 Ga. 328.

² *Roselins v. Delachaise*, 5 La. An. 482. ⁴ *Eastman v. Coos Bank*, 1 N. H. 26.

“It was the attorney’s duty to prove his retainer by the person sought to be charged. This he might do by showing that the defendant called upon him in regard to the business; that she executed his directions in connection therewith; that she was present at the trial while he was managing it on her behalf; or that she spoke of or recognized him in some manner as her attorney.”¹

In the absence of an express retainer, an attorney may prove that the person sought to be charged conferred with him in regard to the suit; executed his directions in connection therewith; makes affidavit to the truth of the answer which the attorney has drawn; was present at the trial which the attorney was managing in the client’s behalf without making any objection; entrusts to the attorney papers necessary to the successful prosecution of the suit; or that the client acknowledged or in some manner recognized the attorney in the presence of third persons: all these things are evidences of a retainer, and will be strengthened by the fact that the attorney was acknowledged as such by the counsel of the opposite side. If an attorney, having in his hands papers necessary to be used in the defense of a suit, enter upon that defense in the presence of the party for whom he appears, and retains the papers without objections, such facts are evidence of a retainer and promise to pay for his services, as well upon the particular occasion of the first appearance, as afterwards.²

§ 340. Evidence for plaintiff.—It is necessary for the plaintiff to prove a retainer. The fact that his services rendered for some one else were also beneficial to the defendant, is not enough, without proof of retainer by the latter.³ The retainer, however, may be inferred from all the circumstances of the case.⁴ The burden of proof is on the attorney to prove the

¹ *Turner v. Myers*, 23 Iowa, 391; 9 Johns. 142; 1 G. Greene, 117; 2 Ind. 630.

² *Goodall v. Bedell*, 20 N. H. 205.

³ *Wharton on Agency*, sec. 616; *Turner v. Myers*, 23 Iowa, 391; *Barker v. York*, 3 La. An. 90; *Burghart v. Gardner*, 3 Barb. 64; *Chicago R. R. Co. v. Larned*, 26 Ill. 216; *Roselius v. Delachaise*, 5 La. An. 482; *Michen v. Granice*, 11 La. An. 596; *Savings Bank v. Benton*, 2 Met. (Ky.) 240.

⁴ *Hood v. Ware*, 34 Ga. 328; *Graves v. Lockwood*, 30 Conn. 276; *Hotchkins v. Leroy*, 9 Johns. 142; *Bowman v. Tallman*, 27 How. 212; *Goodall v. Bedell*, 20 N.

extent and value of his services, and the fairness of his charge and the amount claimed.¹ Evidence that one who had a claim which he intended to prosecute at law, sent for an attorney and employed him to assist him as counsel through the whole case, and that the attorney agreed so to do, and gave him advice several times, will warrant a finding for an attorney, in an action by him for fees.²

This proof may be by parol,³ and the opinion of professional witnesses may be received as to the value of the services, but such opinions are not conclusive.⁴ When the action is upon a *quantum meruit*, the professional standing of the attorney may be inquired into, as affecting the value of his services, and so may the amount of his business, as tending to show his professional standing.⁵

The measure of compensation depends on the legal knowledge and professional activity required, and also upon the responsibility taken.⁶ An attorney in collecting a debt is entitled to commissions, dependent upon the skill and care applied, and the amount collected.⁷

The nature and extent of the services of counsel may be proved by parol. Their signatures and pleadings need not be shown, when they have been employed to advise and assist other counsel. The opinion, however, of witnesses as to the value of services is not conclusive, but when corroborated, and giving apparently a fair estimate, should be adopted.⁸ When a note is

H. 205; *Bogardus v. Livingston*, 7 Abb. Pr. 428; *Fore v. Chandler*, 24 Tex. 146. See *Seeley v. North*, 16 Conn. 92, *Briggs v. Georgia*, 15 Vt. 61; *Smith v. Dougherty*, 37 Vt. 530.

¹ *Stow v. Hamlin*, 1 How. Pr. 452; *Planters' Bank v. Hemberger*, 4 Cold. 578; *McMahon v. Smith*, 6 Heisk. 167.

² *Perry v. Lord*, 111 Mass. 504.

³ *Brewer v. Cook*, 11 La. An. 637.

⁴ *Ibid.* *Vilas v. Downer*, 21 Vt. 419.

⁵ *Phelps v. Hunt*, 40 Conn. 97.

⁶ *Wharton on Agency*, sec. 616; *Vilas v. Downer*, *supra*; *Macarty's Succession*, 3 La. An. 518; *Lee's Succession*, 4 La. An. 578; *Virgin's Succession*, 18 La. An. 42; *Kentucky Bank v. Cowles*, 7 Pa. 543; *Duncan v. Yancey*, 1 McCord, 149.

⁷ *Morel v. New Orleans*, 12 La. An. 485; *Commandeur v. Carrollton*, 15 La. An. 7; *State v. Hawkins*, 28 Mo. 366; *Quint v. Ophir Co.*, 4 Nev. 304; *Gordon v. Miller*, 14 Md. 204; *Leach v. Strange*, 3 Hawks, 121; *Farmers' Loan Co. v. Mann*, 4 Robt. 356.

⁸ *Brewer v. Cook*, 11 La. An. 637; *Succession of Wells*, 24 La. An. 162; *Cullom v. Mock*, 21 La. An. 687.

given for services to be rendered, its non-payment justifies the attorney in refusing the continuance of such services; and if those rendered before maturity of the note be worth its amount, he will recover on it.¹ A solicitor is entitled to charge for attendance, if he actually attends upon the hearing, though he does not hear the whole argument, or take any part therein.² A note given for a fee may be collected though the cause be compromised before the payee has performed all the services he was expected to render.³ Where an attorney becomes incapacitated from acting through no fault of his own, as from being elected to the bench, his part-performed contracts for services are divisible, and he may recover for what he had already done.⁴ An attorney cannot claim compensation from two conflicting parties, and it appears that counsel for plaintiff, in a suit for dissolution, cannot claim compensation as associate counsel for the receiver.⁵

Retainer in appellate court.—A retainer to conduct a suit in the lower courts does not necessarily imply a retainer to carry the case up to the court of last resort. But when a case is entrusted to an attorney for appeal to a higher court, he is not responsible for the merits or demerits of the appeal, but is entitled to payment for his services in any event.⁶

§ 341. What the defendant may show.—In an action for fees the client may prove, as a part of his defense, that the case was a plain case, requiring but little labor, or skill, or learning, or time, or if it required skill and attention, that these were not bestowed. The value of a lawyer's services depends upon his skill and learning, and the attention he gives to the business of his client. Proof, therefore, of his skillful conduct of his case, or of his negligent or unskillful treatment of it, is an important inquiry. Anything which shows that the plaintiff has no right of recovery at all, or to the extent claimed on the case as he

¹ Cooley v. Doherty, 5 La. An. 163.

² Wendell v. Lewis, 8 Paige, 613.

³ McLain v. Williams, 8 Yerg. 230. See Clendinen v. Black, 2 Bail. 488.

⁴ Baird v. Ratcliff, 10 Tex. 81.

⁵ Adams v. Woods, 8 Cal. 306.

⁶ Case v. Hotchkiss, 3 Keyes, 334; S. C. 3 Abb. Pr. N. S. 381. See Hopkins v. Mallard, 1 Greene, 117; Dearborn v. Dearborn, 15 Mass. 316.

makes it, may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer.¹

A defendant may, after a payment into court, show that the work was to be done for costs out of pocket merely, and not for regular fees and charges.² An agreement with an attorney that he shall get his costs out of the fund in the suit, implies the condition that he is continued in the conduct of the suit, until there is a fund in court available for costs.³

The defendant may, under the general issue, disprove the retainer and employment.⁴ He may show, for instance, that the plaintiff performed the work in the character of trustee,⁵ or that plaintiff and defendant were in partnership in the transaction which gave rise to the litigation,⁶ or that plaintiff agreed to perform the work without compensation,⁷ or undertook to charge only costs out of pocket. But if an attorney undertake to charge a party only costs out of pocket, "in case damages or costs should not be recoverable," and the party does recover a verdict, but the defendant becomes insolvent, the attorney may recover the full costs.⁸ But a mere misrepresentation by the client, which the attorney might, by proper investigation, have corrected, will not entitle the attorney to sue for his full costs.⁹ The defendant may also show that it was understood and agreed that the attorney should look to some other party for payment.¹⁰ The performance of the work may be disproved by showing that the business charged was performed without the assistance of the plaintiff,¹¹ or was never completed.¹² But if the non-completion arise, not from the plaintiff's, but from the defendant's default, as the latter's omission or neglect to supply funds, etc., it

¹ *Bridges v. Page*, 13 Cal. 640.

² *Jones v. Reade*, 5 Ad. & E. 529; 2 Har. & W. 382.

³ *Hollings v. Booth*, 2 Fost. & F. 220.

⁴ *Aldis v. Gardner*, 1 Car. & K. 564.

⁵ *Moore v. Froud*, 1 Jur. 653.

⁶ *Milburn v. Codd*, 1 M. & Rob. 238; 7 Barn. & C. 419.

⁷ *Ashford v. Price*, 3 Stark. N. P. C. 185.

⁸ *In re Stretton*, 14 Mees. & W. 806.

⁹ *Thwaites v. Mackerson*, 3 Car. & P. 311.

¹⁰ *Spurrier v. Allen*, 2 Car. & K. 210.

¹¹ *Hopkinson v. Smith*, 1 Bing. 13; *Noel v. Hart*, 8 Car. & P. 230.

¹² *Nichols v. Wilson*, 11 Mees. & W. 106; 2 Dowl. N. S. 103; 12 Law J. N. S. 206; *Cresswell v. Byron*, 14 Ves. 272.

does not constitute a defense.¹ The defendant may show that the work was totally useless to the client; but it should be entirely useless to constitute a defense as where performed after an offer of compromise, of which the plaintiff, by neglecting to communicate it to his client, deprived him of the benefit.² And so, where the services, though at first advantageous to the defendant, were afterward rendered abortive by the attorney's neglect.³ The defendant may, under the general issue, object to items in the plaintiff's charges as incurred for useless work; but this must be clearly established.⁴ The mere imputation of negligence on the part of the attorney by which the defendant was prejudiced, so long as the immediate object for which the attorney was employed was not entirely defeated, can only be made the subject of a cross action;⁵ and where negligence is relied upon as specially set up, it seems that it must have been the only cause of failure in order to avail the defendant, and defeat the plaintiff's claim for remuneration.⁶ When special pleas are relied upon, the burden of proof is of course upon the defendant. Where an attorney prepares a document, which turns out to be illegal, but concerning the illegality of which there was reasonable doubt, he is entitled to recover for preparing it.⁷

Fraudulent conduct on the part of the attorney will be a good defense to an action for fees;⁸ and so where the advice given to the client was clearly that the defendant should commit a breach

¹ *Rowson v. Earle*, Moody & M. 538; *Van Sandan v. Browne*, 9 Bing. 402.

² *Hill v. Featherstonehaugh*, 7 Bing. 569; *Hill v. Allen*, 2 Mees. & W., 284; *Symes v. Nipper*, 12 Ad. & E. 277, n.; *Bracey v. Carter*, Ibid. 373. See *Cousins v. Paddon*, 2 Crompt. M. & R. 547, 556; *Randall v. Ikey*, 4 Dowl. 682; *Huntley v. Bulwer*, 6 Bing. (N. C.) 111; *Sill v. Thomas*, 8 Car. & P. 762.

³ *Bracey v. Carter*, 12 Ad. & E. 373.

⁴ *Shaw v. Arden*, 9 Bing. 287.

⁵ *Templar v. McLachlan*, 2 New Rep. 136; *Edward v. Cooper*, 3 Car. & P. 277. In one case, where an action having been brought against an attorney for negligence, in which action the jury gave a verdict for the plaintiff, finding also that the attorney had been guilty of gross negligence, and then the attorney brought an action for his bill of costs, the court refused to stay proceedings in the latter action. *Smith v. Rolt*, 2 Dowl. P. C. 62.

⁶ See *Dax v. Ward*, 1 Stark. 409; *Pasmore v. Birnie*, 2 Stark. 59; *Johnstone v. Alston*, 1 Camp. 176. See also *Wilson v. Russ*, 7 Shep. 420; *Suydam v. Vance*, 2 McLean, 99; *Hogg v. Martin*, Riley, 156; *Cox v. Livingston*, 2 Watts & Serg. 103.

⁷ *Potts v. Sparrow*, 6 Car. & P. 749.

⁸ *Brackett v. Norton*, 4 Conn. 517.

of the peace, as to engage in a riot.¹ But fraud or unfaithfulness of an attorney in one matter intrusted to him will not deprive him of his right to compensation for other independent services which were duly performed.² In an action for fees by an attorney against his client, the latter may show, under the general issue, that the attorney conducted the business so negligently that his services were of no benefit to the client, and thus defeat the whole claim; but if the evidence be merely in diminution of the value of the attorney's services, then notice should be given with the general issue.³

It is said that if an attorney neglects to pay over money to his client, when collected, for an unreasonable time, he is entitled to no compensation for his services in recovering it.⁴

It is a good defense that the attorney knew of the full settlement of the cause, and yet unnecessarily, and without authority, took further proceedings. For such unnecessary services he cannot recover.⁵ An attorney cannot recover against his client the costs of a suit in which judgment is set aside for irregularity committed by himself, nor the costs of opposing the motion to set aside the proceedings; nor can he recover for money paid for his client, if it were paid to satisfy costs of a judgment of discontinuance suffered by his ignorance or neglect.⁶ Nor is he entitled to compensation when he improperly detains money until he is sued for it,⁷ nor when, through his neglect, his services are totally without value.⁸

§ 342. Attorney's services, when considered as necessities.—An infant may be liable, as for necessities, for services of an attorney rendered in defending him; but it appears

¹ *Treat v. Jones*, 28 Conn. 334; *Arrington v. Sneed*, 18 Tex. 135.

² *Currie v. Cowles*, 6 Bosw. 452.

³ *Gleason v. Clark*, 9 Cowen, 57. See *Runyan v. Nichols*, 11 Johns. 547.

Proof, in such an action, that judgment, as in case of nonsuit, was obtained against the client, is not, *per se*, evidence of negligence. (*Gleason v. Clark*, 9 Cowen, 57.)

⁴ *Wills v. Kane*, 2 Grant Cas. 60.

⁵ *Elwood v. Wilson*, 21 Iowa, 523. See *Warner v. Hoffman*, 4 Edw. 381. As to fees in consolidated suits, see *Brackett v. Sears*, 15 Mich. 244.

⁶ *Hopping v. Quin*, 12 Wend. 517.

⁷ *Bredin v. Kingland*, 4 Watts, 420.

⁸ *Nixon v. Phelps*, 29 Vt. 198.

that it must be some proceeding personal to the infant, as services rendered by an attorney for an infant for the protection of the latter's rights of property are not necessities, and the attorney cannot recover for them of the infant, whether he had or had not a guardian.¹ Services of an attorney rendered to a wife in prosecuting a libel for divorce against her husband are not necessities,² nor are those rendered in defending a libel of the husband against the wife;³ but if rendered in prosecuting the husband upon the complaint of his wife for breach of the peace, and necessary for her safety, they are necessities.⁴ If, however, there were no reasonable grounds for instituting the proceedings, the rule may be different; but if rendered in defending a groundless prosecution brought by the husband against the wife to compel her to find sureties to keep the peace, they are necessities.⁵

§ 343. Measure of compensation.—The compensation is to be graduated with a proper reference to the nature of the business performed by the counsel for his client, and his standing in his profession for learning and skill, whereby the value of his services is enhanced to his client; and evidence of usage is admissible⁶ to show what is the rule of compensation for similar services to those sued for.⁷ “Concerning the ‘pleader’s salary,’” says the *Mirror*,⁸ “four things are to be regarded: 1. The greatness of the cause; 2. The pains of the serjeant; 3. His worth, as his learning eloquence, and gift; 4. The usage of the court.” In fixing the amount of a reasonable fee, the examination should be directed to what is customary for such legal services, where contracts have been made with persons compe-

¹ *Barker v. Hibberd*, 54 N. H. 539; S. C. 20 Am. R. 160; *McCrillis v. Bartlett*, 8 N. H. 569; *Munson v. Washband*, 31 Conn. 303; *Phelps v. Worcester*, 11 N. H. 51; *New Hampshire Co. v. Noyes*, 32 N. H. 345.

² *Morrison v. Holt*, 42 N. H. 478.

³ *Ray v. Adden*, 50 N. H. 82; S. C. 9 Am. R. 175.

⁴ *Morris v. Palmer*, 39 N. H. 123.

⁵ *Warner v. Heiden*, 28 Wis. 517; S. C. 9 Am. R. 515; *Smith v. Davis*, 45 N. H. 566.

⁶ *Vilas v. Downer*, 21 Vt. 419; *Kentucky Bank v. Combs*, 7 Barr. 543. See *Sharswood's Professional Ethics*, 151, 152.

⁷ *Ibid*; *Bodfish v. Fox*, 23 Me. 94.

⁸ Chap. 3, sec. 5.

tent to contract. The inquiry should be, not what an attorney thinks is reasonable, but what is the usual charge.¹ When there is no express agreement, the court may allow the attorney better compensation than a taxed bill of costs affords; and such compensation cannot be defeated by an immediate assignment of the verdict by the client to a third party, and payment to the attorney of the taxed bill.²

The measure of compensation has been said to be the exercise of legal knowledge, the responsibility incurred, and the labor bestowed, and sometimes the amount involved is considered.³ In suits requiring great professional labor, where much time must necessarily be consumed, and diligence and skill required in the preparation and management of them, an attorney may rightfully and legally charge, by way of counsel fee, a sum proportioned to the value of the services, and which a jury, upon evidence before them, are competent to ascertain and decide on.⁴

An attorney who undertakes to conduct a suit upon the terms that he is not to be paid unless it succeeds, is not, it is held in England, entitled upon failure of the suit to recover money paid out of pocket.⁵ But where the attorney undertakes as follows:

¹ *Reynolds v. McMillan*, 63 Ill. 46. An attorney may recover fees for services rendered to a corporation, though he be a stockholder, and the presumption is that his services were legal. Where particular services are sued for, and the sums charged for the same were specified in a bill of particulars, it was held that the opinions of witnesses called as experts should have been confined to the value of the services so specified, and that it was not competent to prove the value of all the services, in gross, including supposed services beyond those sued for. (*Barker v. Company*, 3 *Thomp. & C.* 328.)

² *Cregier v. Cheesebrough*, 25 *How. Pr.* 200.

³ *Succession of Macarty*, 3 *La. An.* 518; *Succession of Lee*, 4 *Ibid.* 578. See *Edelin v. Richardson*, 4 *Ibid.* 503; *Uzee v. Biron*, 6 *Ibid.* 565; *Succession of Virgin*, 18 *Ibid.* 42. As to what is reasonable compensation in particular cases, see *Farmers' Co. v. Mann*, 4 *Robt.* 356; *Christy v. Douglass*, *Wright*, 485; *Kentucky Bank v. Cowles*, 7 *Pa.* 54. In the absence of express contract, see *Webb v. Browning*, 14 *Mo.* 353; *Smith v. Davis*, 45 *N. H.* 566; *Garr v. Mairet*, 1 *Hilt.* 498.

⁴ *Duncan v. Breithaupt*, 1 *McCord*, 149. An instruction to the jury in a suit to recover counsel fees, that "if plaintiffs were employed by defendant to come to San Francisco, to Virginia City, or to Aurora, and there was no special agreement as to the amount to be paid, they can only recover the value of the services rendered at the place where they were rendered, with the addition of reasonable traveling expenses, and if the latter were paid by the defendant, then they cannot be recovered by the plaintiffs," was held clearly erroneous, and properly refused. (*Quint v. Ophir*, 4 *Nev.* 307.) The loss of other business may be taken into consideration.

⁵ *Turner v. Tennant*, 10 *Jur.* 429.

“Should the damages or costs not be recoverable in this action I shall charge you costs out of purse only,” the plaintiff obtained a verdict with damages and costs, but the defendant obtained his discharge under the Insolvent Acts, and the plaintiff only received a trifling dividend on his judgment; it was still held that the attorney was not limited by his undertaking to costs out of pocket only.¹ Where an attorney undertook a prosecution for perjury on the defendant’s behalf, agreed not to charge his full costs, except money out of pocket, and he disbursed a large sum toward carrying on the proceedings, but by negligence brought a defective indictment, and in consequence the prosecution failed, it was held that he could not recover for the disbursements.²

An attorney is not entitled to recover his bill of costs for conducting an action which he has not terminated, but which has been discontinued, unless he shows satisfactory reasons for not proceeding with it, and gives his client reasonable notice thereof.³ Solicitors of companies cannot recover costs in respect of business undertaken with full knowledge that it is beyond the powers of the company, nor can they appropriate money belonging to the company received by them on a general account to the payment of such costs.⁴ The attorney may, by express undertaking, limit his costs to a certain amount, and cannot then recover more.⁵ Where plaintiff sues in *forma pauperis*, and obtains a verdict, whatever is the amount recovered, nothing is to be allowed on taxation of costs in respect of fees to his counsel, or by way of remuneration for the services of his attorney.⁶

The measure of the compensation of an attorney or counsel is to be governed by the express or implied agreement between him and his client. Implied agreements between attorney and

¹ Stretton, In re, 14 Mees. & W. 806; 3 Dowl. & L. 278; 15 Law J. Ex. 16.

² Lewis v. Samuel, 8 Q. B. 685; 10 Jur. 429; 15 Law J. Q. B. 218. See Young v. Walker, 16 Mees. & W. 446.

³ Nicholls v. Wilson, 14 Mees. & W. 106; 2 D. N. S. 1031.

⁴ Phoenix Life Insurance Co., In re, 1 H. & M. 433; 11 Week. R. 984; 8 Law T. N. S. 728.

⁵ Moore v. Hall, 13 Week. R. 83; 11 Law T. N. S. 274; 17 Com. B. N. S. 760.

⁶ Dooley v. Great Northern Railway Company, 4 El. & B. 341; 3 Car. Law Rep. 110; 1 Jur. N. S. 228; 24 Law J. Q. B. 25. See also, Holmes v. Penny, 9 Ex. 584; 2 Car. Law Rep. 1004; 23 Law J. Ex. 132.

client stand upon the same footing with the like agreements between other parties. Where there is no express agreement as to compensation, the attorney, in order to recover against his client, must now prove generally what services he has rendered. Evidence that a person was employed to render service does not prove that the service stipulated for has been rendered. The party claiming compensation must go further, and show the extent of his performance and its value. The law will not presume, from the mere proof of the undertaking, that the party has performed any valuable services under it.¹

In the absence of a contract between attorney and client, fixing the value of the services of the former at the price to be paid therefor, the attorney has a right to a reasonable compensation; but the jury are the proper judges of the value of such services, and in considering the reasonableness of such compensation, they may take into consideration all the circumstances of the case, and are not bound by the opinions of witnesses summoned as experts; but their opinions should be considered in connection with the other evidence in the case. And the jury having once given their verdict, the appellate court will not interfere with it, unless the judge in the court below misled the jury by some misdirection.²

Where an attorney is employed generally to guard his client's interests in a particular matter, and bestows labor in investigations which lead to the conclusion that his client has no real interest in the matter, he is entitled, nevertheless, to compensation for his services. If plaintiff prove the services on account of which he sues, but introduces no proof of their value, the jury may, from their own knowledge of the business and affairs of society, fix a reasonable value and find a verdict accordingly.³

An agent of a bank, by means of false representations as to his authority to employ attorneys for his principal, secured professional services for the bank in sundry attachment proceed-

¹ *Stow v. Hamlin*, 11 How. Pr. 452.

² *Rose v. Spies*, 44 Mo. 20. The responsibility of determining the amount of fees due for professional services is a matter of great delicacy, and the court must be guided by a conscientious estimate of their value. (*Succession of McCarty*, 3 La. An. 62.) Counsel fees are, in point of fact, from their very nature honorary, and are not susceptible of an accurate appreciation in money. (*Edelin v. Richardson*, 4 La. An. 503.)

³ *Darby v. Knapp*, 2 Mo. Appeal Reports, 486.

ings, and on suit brought against the bank by the attorney for the value of his services, it turned out that the agent had no such authority as represented, and so the bank could not be made responsible; but the attorney was held to have his action against the agent personally for the value of his services, and the measure of his damages was held to be the reasonable value of his services as attorney, together with the actual amount of his costs, incurred in the suit against the bank.¹

An attorney at law may maintain an action on an implied assumpsit for professional services rendered by him, and the rate of compensation is independent of the benefit received. In every transaction in life where there has not been negligence, want of skill, or a stipulation to the contrary, labor is to be rewarded in proportion to the pains taken in it, and not in proportion to the results produced by it. The employer takes his chance of that.² There is no implied guarantee, by an attorney or counsel, when retained by the client in the ordinary manner, of ultimate success, or of the soundness of his opinions, or that they will be finally sustained by the court of last resort. The only contract which is implied is that of ordinary skill, attention, and diligence.³ "The services of a lawyer are not to be estimated by the length of his speeches, nor the benefit to his client by the number of them," and a lawyer is entitled to his counsel fee, although he does not argue the case, where argument is unnecessary.⁴ Where the defendants had retained the plaintiff as their counsel to defend them in certain actions, and executed a note to him for the sum stipulated as his fee. To an action on the note defendants pleaded that the consideration had failed—the plaintiff never having rendered the services for which the note was given as compensation. There was no evidence of any services rendered; but it was proved that the

¹ *Wright v. Baldwin*, 51 Mo. 269. The court ought not to receive testimony of the value of such professional services as administering an estate. It should pass upon them as an expert. As the services to be thus compensated are rendered under the eye of the court, it should fix the value of them on its own responsibility. (*Dorsey v. Creds.* 5 Martin N. S. 399; *Baldwin v. Carleton*, 15 La. 395.)

² *Foster v. Jack*, 4 Watts, 334.

³ *Bowman v. Tallman*, 2 Robt. 385; 27 How. Pr. 212.

⁴ *Hennen v. Bourgeat*, 12 Rob. La. 522.

parties who had cited the defendants had effected a compromise by which the latter were discharged. The court held that the attorney was entitled to recover on the note, and that his inaction might have been the result of a conviction that it would lead to a compromise more advantageous to his clients than any judgment which he could hope to obtain. "It is clear," said Martin, J., "that if he had run the risk of a trial and failed, he would have been entitled to the stipulated reward; and we agree * * that he equally earned it by temporizing and holding himself ready to improve any favorable chance that might present itself." Nor will professional charges be rejected merely for want of success in litigation, unless some clear proof of mismanagement, neglect of duty, or gross ignorance is shown.¹ The fact that two other counsel were engaged before him in the same case will not deprive the third counsel of his fee, unless the client shows he neglected his duty. But where several suits are made to depend upon the argument of one, the charges should not be multiplied at the full rate, as if there had been separate hearings in each case, but should be confined to such services as were actually rendered.²

¹ Brackett v. Sears, 15 Mich. 244.

² Brackett v. Sears, 15 Mich. 244.

Considerations which may influence professional charges.—In discussing the proper basis for computing the compensation of attorneys and counsel in the absence of any express agreement, the U. S. Circuit Court, in *Lombard v. Bayard*, (1 Wall. Jr. 207) said: "The law could not well fit a standard which would be just in all cases, nor can the court. The services of men of learning, skill, and experience in their professions are not to be rated like those of day laborers. It is a question of great delicacy for the court to be called upon to judge what is a proper compensation for them. The facts of the case from their character cannot be sufficiently brought, or very sufficiently discussed, before the court, nor the compensation tested by any certain rule; and this last point must generally be submitted to the candor and judgment of the members of a profession eminent among all others for honor and integrity." * * * * *

"Every gentleman of the bar well knows that there cannot be any one rule of charges in the nature of a horizontal tariff for all causes. Often where the parties are poor, and the matters in contest small, counsel receive but very inadequate compensation for their exertion of mind and body; and for myself, I know that some of the most severe labors of my professional life have been the least well paid. In other cases, where the parties are wealthy, and the sum in controversy large, they will receive a tenfold greater compensation for a tithe of the same labor. In some cases the whole sum in dispute would be poor compensation. In others, five per cent. of it will be very liberal. Hence in all cases professional compensation is gauged not so much by the amount of the labor, as by the amount in controversy, the ability of the party, and the result of the effort."

At the time when fees were fixed by statute, the law implied a promise on the

§ 344. The Statute of Limitations does not commence to run on the claim of an attorney for services and disbursements until the termination of the proceeding in which they were rendered and disbursed, where his employment was to conduct such proceeding to its termination, or until the employment is otherwise terminated. Interest is recoverable from the time the account is rendered to the client.¹ Under a general retainer to prosecute an action the attorney may, on perfecting judgment in favor of his client, bring an action immediately to recover his costs, and if he neglects to prosecute within the statutory time after such judgment is perfected, the Statute of Limitations may be pleaded, and will bar the action. As between attorney and client, the amount of costs claimed by the attorney must be liquidated before interest can be allowed.²

§ 345. Compensation under special agreement.—It is established by the weight of authority that even where a fee bill is provided by law, an attorney may make a special agreement with his client for compensation.³ We have already seen that an extortionate agreement will not be upheld. An assignment by the client to his attorney, by way of security for services actually rendered, will be sustained; but not a direct sale.⁴ The agreement may secure to the attorney a fee proportionate

part of the client to pay his attorney for his services at least the statute rate of compensation. The burden of proving that the attorney undertook to perform the service for a less rate, or without charge, rested upon the client.

Such an agreement, being in the face of a legal conclusion to the contrary, should be made out by evidence equal to a positive stipulation. (*Brady v. New York City*, 1 Sand. 569.)

And the same rule obtains in cases where an attorney is appointed to act as trustee to the estate of an intestate.

¹ *Bathgate v. Haskin*, 59 N. 533; *Davis v. Smith*, 48 Vt. 52; *Fenno v. English*, 22 Ark. 170; *Whitehead v. Low*, 7 Ex. 691; *Hall v. Wood*, 9 Gray, 60; *Adams v. Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 N. Y. 306; *Bowman v. Tallman*, 2 Robt. 385; 11 Eng. L. & Eq. 587; 4 Binn. 339. The statute commences to run from the recovery of judgment. (*Johnson v. Pyles*, 19 Miss. 189.) See, also, *Hancock v. Pico*, 47 Cal. 161.

² *Adams v. Fort Plain Bank*, 23 How. Pr. 45.

³ *Wharton on Agency*, sec. 618; *Wallis v. Loubat*, 2 Denio, 607; *Easton v. Smith*, 1 E. D. Smith, 318; *Jenkins v. Williams*, 2 How. Pr. 261; *Lander v. Caldwell*, 4 Kan. 339; *Major v. Gibson*, 1 Pat. & H. 48; *Lecatt v. Sallee*, 3 Port. 115. But see *Merritt v. Lambert*, 10 Paige, 352; *Simpson v. Lamb*, 7 El. & B. 84.

⁴ *Anderson v. Radcliffe*, El. B. & E. 805-817; *Simpson v. Lamb*, 7 El. & B. 84.

to the amount collected, but is invalid if it amounts to a partnership by the attorney in the venture of a contested litigation.¹

It has been seen that an attorney is entitled to a commission on collections, and that he is to be compensated in proportion not only to the skill and industry applied, but to the responsibility assumed; and he may lawfully contract, in addition to his retainer, for a percentage on the amount recovered by him. But to become a partner in the results of a speculative suit tends to unduly stimulate litigation, and destroys the distinction between counsel and parties. For these reasons courts have generally refused their aid to enforce contracts by which counsel and client try their cases on shares.²

If the special agreement is rescinded, or is void for champerty, the attorney may recover on a *quantum meruit* for his services. But he is limited in such a suit to the valuation he himself attached to his services in the special agreement.³

Where, after an attorney's services are ended, his compensation is fixed by mutual agreement of the parties, effect will be given to the contract. In such case, the parties having themselves established the value of the services, the compensation cannot be withheld on the ground that it is excessive.⁴ An agreement made after a judgment is recovered, that the attorney shall have part of the judgment when collected, is valid.⁵ But an agreement between attorney and client, after the former has been employed, by which the original contract is varied, and greater compensation secured to counsel, has been held void;⁶ and so has an agreement by a solicitor to defend a suit concern-

¹ *Wylie v. Coxe*, 15 How. U. S. 416; *Ex parte Platt*, 2 Wall. Jr. 453; *Tapley v. Coffin*, 12 Gray, 420; *Major v. Gibson*, 1 Pat. & H. 48; *Fogerty v. Jordan*, 2 Robt. 319; *Ogden v. Des Arts*, 4 Duer, 275; *Benedict v. Stewart*, 23 Barb. 420; *Bayard v. McLane*, 3 Har. (Del.) 139; *White v. Roberts*, 4 Dana, 172; *Evans v. Bell*, 6 Dana, 479; *Ryan v. Martin*, 18 Wis. 672.

² *Merritt v. Lambert*, 10 Paige, 352; *Satterlee v. Frazer*, 2 Sand. 141; *Boardman v. Thompson*, 25 Iowa, 487; *Halloway v. Lowe*, 7 Port. 488; *Elliott v. McClelland*, 17 Ala. 206; *Stanton v. Haskins*, 1 McAr. 558. As to this distinction in the Roman Law, consult Wharton on Agency, secs. 620, 621.

³ *Coopwood v. Wallace*, 12 Ala. 790; *Lewis v. Yale*, 4 Fla. 418; *Thurston v. Percival*, 1 Pick. 415; *Caldwell v. Shepherd*, 6 T. B. Mon. 392; *Rust v. Larue*, 4 Litt. 416; *Quint v. Ophir*, 4 Nev. 304. See *Lecatt v. Sallee*, 3 Port. 115; *Morgan v. Roberts*, 38 Ill. 65.

⁴ *McElrath v. Dupuy*, 2 La. An. 521; *Jenkins v. Williams*, 2 How. Pr. 261.

⁵ *Floyd v. Goodwin*, 8 Yerg. 484.

⁶ *Lecatt v. Sallee*, 3 Port. 115.

ing land, in consideration of being allowed the rents and profits of the land, pending the suit.¹

An agreement made by an attorney with a client to render his professional services in the "courts of the State," in actions to test the validity of the client's title to certain real estate, in consideration of the conveyance by the client to the attorney of a portion of the land, does not bind the attorney to render his services in an action brought to test the validity of the same title in the Federal Courts for the same State; and such an agreement being fair and free from fraud, and the land conveyed by the client a reasonable fee for the services agreed to be rendered, the attorney will not be compelled to reconvey upon payment of a reasonable fee for services rendered, because, by reason of the suit brought in the Federal Court, the client compromised with the opposing parties, and paid a large sum of money to acquire opposing claims, and the attorney was not compelled to render the full amount of services rendered.²

§ 346. Express contracts between attorney and client.

The rule is now almost, if not quite, universal, that an attorney is as free to make any contract with his client on the subject of compensation for his services as any other individual is; and in Pennsylvania, even at the time when the amount of an attorney's or counselor's fees was fixed by statute, where the contract between attorney and client was a *specialty* contract, such as a bond, note, or other obligation, an action might be maintained thereon, and recovery had, by the lawyer.³ But the remedy of the attorney against the client on *all* contracts was recognized in the case of *Gray v. Breckenridge*, 2 Pa. 181, and the right of the lawyer to recover was no longer restricted to specialty contracts, but was extended to all express contracts, and to one class of implied contracts—*i. e.*, an *assumpsit* to pay for an attorney's services *quantum meruit*.

"In all cases where the relation of attorney and client exists, and it is desired to make further professional engagements, it is the duty of the attorney to have the contract (if there be one) clearly and definitely stated and understood, not only in its lan-

¹ *Merritt v. Lambert*, 10 Paige, 352.

² *Mahoney v. Bergin*, 41 Cal. 423.

³ *Mooney v. Lloyd*, 5 Serg. & R. 412.

guage, but also in its spirit, and legal and practical results." It is necessary "that the means used to obtain the contract be free, not only of fraud, actual or constructive, but also of any other inequitable consideration; that every material circumstance or fact connected with the execution of the contract, and calculated to inform the client of his rights and responsibilities, be declared to him, without reservation; that the attorney inform himself of all such facts and circumstances which would reasonably come within the knowledge of, and which would likely prevent the execution of the contract by, the client; that he does not contract for a greater benefit than his services are reasonably worth, with reference to the trouble and difficulties of the particular case, amount involved, either of a pecuniary character, or reputation personally, etc.; that the onus shall devolve on the attorney to show that the contract was free from all fraud, undue influence, and exorbitancy of demand; that the attorney, having performed his part of the contract reasonably, and with due skill and diligence, without regard to the result of the litigation, shall be entitled to recover the amount specified, provided he brings the contract within the foregoing principles. In the absence of a contract, the attorney is entitled to recover on a *quantum meruit* for such labor as he shall have performed." ¹

Where, in a special contract between an attorney and his client, the former agrees to defend the latter on a charge of felony for a stipulated fee, and after rendering a part of such services, and being willing and ready to render the rest, is prevented therefrom by the escape of said client from justice, said attorney is entitled, under his contract, to the entire fee agreed upon, and he may prove and recover said demand as set-off in an action of debt brought against him by his client.²

So long, therefore, as it be not oppressive, an attorney is at liberty to make any manner of contract with his client, and to take the client's bond, note, or other obligation, for the amount of his stipulated fee; to take assignments of debt, choses in action, etc.; to take conveyances, mortgages, and all manner of securities. The attorney is at liberty to bind himself to render any manner of service, whether to attend to a particular suit or

¹ Planters' Bank v. Hornberger, 4 Cold. (Tenn.) 531.

² Bright v. Taylor, 4 Sneed, (Tenn.) 159.

suits, or to attend generally to his client's legal business for a definite or indefinite term. And the client may lawfully agree to pay his attorney such a recompense for his services as either in amount or kind may be agreeable to the contracting parties, and both parties will be bound by the terms of the contract. Where the contract between the parties is measured by time, such as where an attorney is employed by the year, the contract is binding on both parties for the duration of that time, (unless there is a provision authorizing either party to retract at will or upon notice given) as where a corporation appoints an attorney who accepts the office to manage its legal business for a year, with a stated annual salary, the contract is binding on both parties for that time; and if the attorney is dismissed before the expiration of the year, he may recover his full salary.¹

§ 347. Assignment of debt.—An assignment of a debt, made with notice to the debtor by the creditor, to his attorney in payment of his fees and disbursements in a litigation regarding such debt, is effectual to prevent a set-off against it of a separate and distinct debt due to that debtor from the assignor. And in such case it makes no difference whether the debt assigned and that claimed to be set-off have gone into judgment or are in suit and undetermined. But this decision, forming an exception to the general principle regarding the assignment of a chose in action, is limited to the assignment of a debt or judgment by the creditor to his attorney as security for his services and disbursements in a suit brought upon the debt, or in which the judgment was rendered.²

§ 348. Agreement for fixed sum in gross not void.—Assignment of chose in action.—An attorney at law and his client agreed in writing, that the former should have the sum of \$1,240, in full of all charges for past services, and the further sum of \$400, in full satisfaction of all future services in certain suits; in consideration of which, and for the purpose of securing the payment of the sums above named to the attorney, the client assigned to him his share in his father's estate, then

¹ *Orphan Asylum v. Miss. Mar. Ins. Co.* 8 La. 185.

² *Ripley v. Bull*, 19 Conn. 56.

under administration ; and it was agreed that the attorney should collect and receive the same, and after deducting the necessary expenses, pay to himself said sums of \$1,240 and \$400, and the residue to the client, and that all future bills of costs in those suits, except for money paid out by the client, should belong to the attorney ; and the attorney agreed, in case he should collect the full sum of \$1,640, to pay his client \$100. The attorney continued during his life to carry out the agreement according to its terms, but died without having brought to a conclusion the suits mentioned in the agreement. His executors brought suit to recover \$1,240. The court held that the plaintiffs were entitled to recover. "The transfer was not an absolute sale in payment and discharge of the debt, but merely as security therefor. * * * We perceive no ground of objection to the plaintiff's recovering for past services." * * * "The effect of the indenture was not such as to preclude the testator from resorting to the defendant for prior services, if they were not paid from that source." And it *seems* that no part of the agreement was void for champerty. And so far as the future services were stipulated for, it seems to have been a mere agreement to do certain services as a counsellor and attorney at law, for a specified sum. It does not become any more illegal by reason of taking security for the payment of such fees, by giving the attorney a lien upon the demand when collected.¹

Where a promissory note, being at the time a chose in action, was transferred to an attorney to pay and satisfy him for his fees and charges as attorney and counsel during the pending of an action against his clients to obtain this and two other notes of a like amount, it was held that the plaintiff in the action acquired a lien on the notes, which was good against all persons chargeable with knowledge, or who had knowledge of such lien. The attorney took the note in question with the risk of the plaintiff being able to establish the fraud in its transfer by his clients. If the plaintiff had failed to establish such fraud, the attorney's title would have been perfect. But if he succeeded, the lien created by the commencement of the action would relate back to the time when the action was commenced, and overreach the title of the attorney to retain the note.²

¹ Tapley v. Coffin, 12 Gray, 420.

² Jeffries v. Cochrane, 47 Barb. 557.

§ 349. Promissory note for services.—The following cases show that where a promissory note is given to an attorney for services to be rendered, it must be paid at maturity, even where the payee has not rendered the entire service which was the consideration for the note, at least where the attorney has been in no default.

A party who has given a note payable at a particular day, upon the consideration that the payee, an attorney, agreed to perform certain services for him, but without any time being fixed when the services should be performed, cannot, when the payee is in no default, but able, and ready, and willing to comply with the contract on his part, defeat a recovery on the note, on the ground that the payee had not yet rendered the entire services contemplated by his agreement. The consideration of the note being the agreement of the payee to perform the services, and the payment of the money not being made to depend upon the performance as a condition precedent, and the payee being in no default, the note remains obligatory upon the maker. If the payee of the note had failed or refused to perform the services stipulated, that would be a failure of consideration; but, until he does some act, or omits to perform some duty to which he was bound and which puts him in default, the consideration of the note cannot be said to have failed in any respect.¹

When an attorney was employed to aid or assist in prosecuting an action, for which his client executed a note to him for his fee, and the attorney afterward attended to the suit for about three years, until the client thought it to his interest to put an end to the litigation by compromise without any trial on its merits, it was nevertheless held that the attorney was entitled to recover the whole amount of his fee. The court said the client "was bound in law and morals to pay it, [the fee] because the counsel faithfully performed his part of the contract, and attended to the prosecution of the action from the time he was employed to do so until its termination in the Circuit Court."²

In a case where a promissory note had been given as a fee to an attorney, to secure his services in the defense of a criminal

¹ *Walker v. Clay*, 21 Ala. 797. See *Cooley v. Dougherty*, 5 La. An. 163.

² *McClain v. Williams*, 8 Yer. (Tenn.) 230.

suit, and a *nolle prosequi* having been entered by the prosecution, the maker of the note refused to pay it, on the ground of a failure of the consideration, it was held that the retainer of the attorney was a good consideration for the promise to pay the stipulated amount; and that, as the attorney did all that could be required of him to be done in the suit, and was not in default in the performance of his part of the contract, he was entitled to recover the stipulated remuneration.¹

But a promissory note given as a fee to an attorney for services to be rendered in a suit is not collectible, even when it has been assigned to an innocent transferee, if the attorney has failed to attend, either in person, or by some other competent attorney, and properly conduct the suit.²

§ 350. Contingent and conditional fees.—Champerty.—

We have already had occasion to consider champerty and maintenance as rendering the attorney amenable to the summary jurisdiction of the court.³ Agreements to receive certain parts or proportions of the sum or subject-matter of a suit in the event of a recovery, and nothing otherwise, have often been regarded as void and champertous, and contrary to public policy. It seems to be admitted that an attorney may take into consideration the general ability of his client to pay, and may consider the pecuniary benefit derived from his services. A poor man, for instance, who is unable to pay at all, may properly have, and an attorney may properly entertain, a general understanding that the latter is to be liberally compensated in case of success. Against this course there appears to be no objection.⁴ But in regard to the agreements first mentioned, it was once a question whether it was not an offense at common law, independently altogether of any statute enactment. Chancellor Kent has expressed himself with considerable heat upon the subject. He says: "The purchase of a law suit by an attorney is champerty in its most odious form, and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression, and corruption. As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of

¹ Pennington v. Nave, 15 Ind. 323.

² Ante, secs. 87, 88.

³ Weed v. Bond, 21 Ga. 195.

⁴ Sharswood's Professional Ethics, 156.

the knowledge he acquires in his professional character to speculate in law suits. The precedent would tend to corrupt the profession, and produce lasting mischief to the community.”¹ “It is clear,” says Gibson, C. J., “that if the British Statutes of Champerty were in force here, such fees (contingent fees) would be prohibited by them. But a contract of the sort is not to be encouraged by implication, from a questionable usage, nor established by less than a positive stipulation.”² In several cases they have been deprecated, but yet declared to be valid.³ As against the client of course, where an attorney in a suit purchases the subject thereof, the client may set aside the sale at his pleasure, unless the attorney show clearly and conclusively that no advantage was taken, that everything was explained to the client, and that the price was fair and reasonable.⁴ It has been held that the purchase by an attorney from his client, *pendente lite*, of the subject-matter of the litigation is absolutely void,⁵ and that an agreement between an attorney and his client that the former should pay the costs of an action he had brought for his client, if unsuccessful, was also illegal and void, and could not be enforced by his client.⁶ But in Pennsylvania it was decided that an agreement between counsel and client to pay the former out of the verdict was recognized as an equitable assignment, and the court gave effect to it as against an attaching creditor.⁷ Upon investigating the decisions of the various States of the Union, it will be found that the authorities are about evenly divided.⁸

¹ Arden v. Patterson, 5 Johns. Ch. 48.

² Foster v. Jack, 4 Watts, 338, 339.

³ Ex parte Plitt, 2 Wall. Jr. 452.

⁴ Valentine v. Stewart, 15 Cal. 387; Gray v. Emmons, 7 Mich. 533; Mills v. Mills, 26 Conn. 213; Ford v. Harrington, 16 N. Y. 285; Jennings v. McConnell, 17 Ill. 148; Lewis v. J. A. 4 Edw. Ch. 599; Evans v. Ellis, 5 Denio, 640.

⁵ West v. Raymond, 21 Ind. 305.

⁶ Low v. Hutchinson, 37 Me. 196.

⁷ Patten v. Wilson, 10 Casey, 299.

⁸ It is substantially held in the following cases that champerty is an offense at common law, and that contracts for contingent fees constitute champerty, and are void on that ground, and also as against public policy, viz: Rust v. Larue, 4 Litt. 411; Caldwell's Admrs. v. Shepherd's Heirs, 6 Mon. 391; Thurston v. Percival, 1 Pick. 415; Arden v. Patterson, 5 Johns. Ch. 48; Bleakley's Case, 5 Paige, 311; Wallis v. Loubert, 2 Denio, 607; Backus v. Byron, 4 Mich. 535; Elliott v. McClelland, 17 Ala. 206. To the contrary are Thalhimer v. Brinkerhoff, 3 Cowen, 643; Rainsey's Devises v. Trent, 10 Mon. B. 336; Bayard v. McLane, 3 Harr. 216; Lytle v. State, 17 Ark. 608; New Kirk v. Cone, 18 Ill. 449; Major v. Gibson, 1 Pat. & H. 48; Wright v. Meek, 3 Iowa, 472.

In some States the matter is regulated by statute. In New York, by the Revised Statutes (2 Rev. Sts. 386) it was made an offense, punishable by fine or imprisonment, and removal from the bar, for any attorney, counselor, or solicitor, directly or indirectly to buy, or be in any manner interested in buying, or to advance, or procure money to be advanced, upon anything in action, with the intent, or for the purpose of bringing any suit thereon. The Code of Procedure, however, did not seem to afterward adopt this provision.¹ In Kentucky there seems to have been a statute which provided that any one not a party, receiving as compensation for services in prosecuting or defending a suit the whole or part of the subject-matter in suit, was guilty of champerty, and it has been held that this statute extended to attorneys.² In England contingent fees are held to be within the statutes of champerty and maintenance.³ An agreement to pay the attorney a percentage on the gross amount of property recovered for the client, in addition to his costs, has been held void in England, on the ground that the stipulation was contrary to the policy of the law, and that the solicitor must refund the amount received by him for commission, though included in a settled account.⁴ An agreement to pay one-half of the sum recovered, though not illegal in France, where it was entered into, has been held invalid in England, where the debt was to be recovered, as amounting to champerty; and the attorney was compelled to hand over the amount recovered to his client, and was only allowed to retain his taxed costs.⁵

According to a case in one of the Year Books, it appears to have been anciently considered illegal for an attorney to lay out his own money for the maintenance of his client's suit.⁶ But attorneys and solicitors have long been accustomed in England to make the necessary advances for fees and other necessary

¹ Code Civ. Proc. sec. 258; *Satterlee v. Frazer*, 2 Sand. 142; *Benedict v. Stuart*, 23 Barb. 420; *Ogden v. Des Arts*, 4 Duer, 275; *Sedgwick v. Stanton*, 4 Kern. 289.

² *Davis v. Sharron*, 15 Mon. 64.

³ *Senrice v. Parker*, Rep. Temp. Finch, 75.

⁴ *Pince v. Beattie*, 32 Law J. Ch. 734.

⁵ *Grell v. Levy*, 16 Com. B. N. S. 73; 10 Jur. N. S. 210; 12 Week. R. 378; 9 L. T. N. S. 721. See *Collins v. Brook*, 1 Fost. & F. 407; 4 Hurl. & N. 270; 28 Law J. Ex. 143; *Morgan v. Taylor*, 5 Com. B. N. S. 653; 5 Jur. N. S. 791; 28 Law J. Com. P. 178.

⁶ 11 Hen. VI, fol. 11; Vin. Abr. tit. Maintenance; Com. Dig. tit. Maintenance

expenses of suit, with a view to future repayment, and the practice has been considered free from objection.¹ The attorney was often employed not simply to pay money, but to conduct the cause, and ascertain whether particular payments were necessary or not.² Still, in England, it has been held to be champerty for an attorney to agree to be paid in gross when the suit is recovered;³ and also that an attorney ought not, in any case, to carry on a cause at his own expense, with a promise never to expect a repayment.⁴

Courts have often refused their sanction to agreements on the part of attorneys or solicitors to indemnify clients against the expenses of proceedings taken in their name as to charge costs, as taxed between party and party, in successful cases, and simply costs out of pocket in unsuccessful ones.⁵ The attorney, it appears, is precluded in such cases from suing for the fees he would in ordinary cases be entitled to.⁶ The client appears to be at liberty to refuse to perform any condition annexed to such agreements as that the attorney shall have a share in the property recovered.⁷ The English statutes as to maintenance have not always been considered in force in the United States,⁸ even as part of the common law.

In many portions of the United States, contingent or conditional fees are usual, and have been frequently sustained by the courts. It is a matter of considerable practical importance to the practitioner, and we may be pardoned for dwelling upon the

¹ 2 Inst. 484, 564; 1 Hawk. P. C. 254, sec. 27.

² *Lewis v. Samuel*, 8 Q. B. 485.

³ *Box v. Barnaby*, Hob. 117; Com. Dig. Att'y, B. 14; *Guy v. Gower*, March, 273; *Christy v. Douglas*, Wright, 485.

⁴ 1 Hawk. P. C. chap. 27, secs. 29, 30; *Brash v. Walton*, 8 Johns. 298.

⁵ *McEgan v. Cochrane*, 10 L. T. 37.

⁶ *Twaites v. Mackerson*, 3 Car. & P. 341; *S. C. Moody & M.* 199; *Jones v. Nanney*, 1 Mees. & W. 333; *Jones v. Read*, 5 Dowl. 216; *Ashford v. Price*, 3 Stark. 185; *Lewis v. Samuel*, 8 Q. B. 218; *S. C. Jur.* 429; *Turner v. Tennant*, 1 New Prac. 69, 424; *Saterlee v. Frazer*, 2 Sandf. 141.

⁷ *Saunderson v. Glass*, 2 Atk. 298; *Wood v. Douries*, 18 Ves. 120; *Wells v. Middleton*, 4 Brown Parl. C. 26; *Bellew v. Russell*, 1 Ball & B. 97; 2 Inst. 208, 484, 564; *Stats. Westm.* i, chap. 25; *Westm.* iii, chap. 29; 28 Edw. I, chap. 11. See *Flight v. Leman*, 4 Q. B. 883; *Pechell v. Watson*, 8 Mees. & W. 691. See, generally, *Ex parte Yeatman*, 1 Dowl. 304; 1 Har. & W. 510; *In re Stretton*, 14 Mees. & W. 806; 3 Dowl. & L. 278; 15 L. T. Exch. 16; *Hutley v. Hutley*, Law R. 8 Q. B. 112.

⁸ *Richardson v. Rowland*, 40 Conn. 565; *Whart. C. Law*, sec. 2804.

subject at considerable length, in the endeavor to state as fully as may be, the various distinctions which have been taken; remarking once for all that the *locality* is an important element to be considered, as the rule varies in different States, and the general, common-law prohibition against champerty has received a free or strict construction, as the leanings of the courts or the provisions of local statutes have suggested or demanded.

Contingent or conditional fees are of two kinds: 1. Where the attorney stipulates to receive, as compensation for his services, part of the thing or claim to be recovered in the action; 2. Where, in case of success in the suit, the attorney's compensation is to be increased, either in the ratio of the value of the amount recovered, or by a sum certain. We have seen that in many of the States the former kind of agreement for a conditional fee is champertous and void; but in neither case, except where statutes have abolished all restrictions on the contract between attorney and client, is the practice of bargaining for a contingent fee much favored by the courts. Contingent or conditional fees, when legal, are governed generally by the laws relating to express contract between attorney and client.

§ 351. Contracts held champertous.—An agreement by which an attorney is to receive for his services in recovering a claim a part of the claim or thing to be recovered, is champertous and void in Indiana.¹ In Massachusetts, an attorney was employed to aid in the recovery of a sum of money, for which he was to receive ten per cent. on the sum recovered. This contract was held void, as being champertous at common law.² So in *Lathrop v. The Amherst Bank*, 9 Met. 481, it was held that an agreement between A and B, that B shall prosecute and manage A's suit at law, and that he shall receive for his services a certain per cent. on the amount that shall be recovered, and that if he does not recover, A shall pay him no more than his actual expenses, amounts to champerty; and is so far illegal and void, that B, after obtaining judgment for A, cannot maintain an action on the agreement. The court say: "The

¹ *Scobey v. Ross*, 13 Ind. 117. And see *Holloway v. Lowe*, 7 Port. 488; 1 Ala. 246.

² *Thurston v. Percival*, 1 Pick. 415.

contract on which the plaintiff seeks to recover was illegal; being in violation of the principles of law in reference to maintenance and champerty. Such agreement for a proportionate share of the fruits of litigation as a consideration for services rendered in conducting and prosecuting with success a suit at law, where the party has no interest, legal or equitable, and has no claim or expectancy, even remotely contingent, has been deemed contrary to public policy, and proscribed by statutes and the common law. The statutes 3rd and 13th Edward I related to officers of the king, but the provisions were further extended and made applicable to other persons by statute 28 Edward I." The same was the rule in New York. Thus, in *Merrit v. Lambert*, 10 Paige, 352, it was held that an attorney, solicitor, or counsel could not, previous to a determination of the suit, contract with his client for a part of the demand or subject-matter in litigation, as a compensation for his services. This case, *sub nomine Wallis v. Loubat*, was affirmed in 2 Denio, 607. So also in *Satterlee v. Frazier*, 2 Sand. S. C. 141, it was held that an agreement, by a party having a demand against an estate, by which he employed an attorney to collect it, and was to pay him one-half of the claim for his services in collecting it, or procuring it to be paid, was champertous and void. The New York Code of Procedure has changed the law in this respect, so that now parties can make such bargains with their attorneys as they please. In two instances in Kentucky, a conditional or contingent fee was held not to be champertous. In *Evans v. Bell*, 6 Dana, 479, Bell had brought an action for slander, and had employed Evans as his attorney to conduct the suit, and agreed to pay him for his services a sum *equal to* one-tenth of the amount of damages which might be recovered. This was held to be valid; but the decision was placed upon the ground that the sum to be paid was not to be out of the damages to be recovered. The court say: "The covenant is not champertous from anything apparent on its face. It does not import an undertaking to give any part or parcel of the thing in suit or of the damages to be recovered; but is an obligation to pay a contingent fee made dependent on a recovery, and to be regulated in amount by the amount recovered. It is evident that had the agreement been to pay one-tenth of the sum to be recovered, it

would have been held champertous and void." In the case of *Ramsey v. Trent*, 10 B. Mon. 336, it was held that a contract to pay counsel a fee *equal to* one-fourth of the value of the land that might be recovered, less the costs of the suit, and to wait until the land should be sold, was not champertous. This was placed upon the ground that the agreement was not to give "part or profit out of the thing in contest." "The reference to one-fourth of the value of the land is only for the purpose of measuring or ascertaining the fee." In Indiana, a contingent fee is champertous. So where A, by power of attorney, constituted B, a lawyer, his agent to secure and collect his interest in an estate, and as a part of the same transaction B agreed to prosecute the claim of A for one-half of whatever of said estate he might obtain; it being apparent that litigation in court was contemplated for the recovery of said claim, the contract was held to be champertous and void.¹ And where an attorney had made a void and champertous contract with the plaintiff for compensation out of the subject in litigation, the court held that the contract being void, the attorney had no lien upon the judgment recovered for compensation, to any extent whatever.²

In Ohio, a contract with an attorney that he shall prosecute suits for the recovery of property, to share in the property if recovered, and that no compromise shall be made except with his assent, was held illegal and void.³ In the course of an opinion, Burnett, J., said: "In this State we have no general statute prohibiting or punishing champerty, and the common law, in relation to crimes and misdemeanors, is not in force. But although this may be the case, it by no means follows that they may be lawfully and innocently practised, or that the aid of the State tribunals may be had to sanction and enforce them. The contract between these parties is against public justice, and such engagements have always been considered as injurious to the peace and happiness of the community. The nature and moral tendency of actions cannot be affected by the manner in which the law treats them. If they be in their nature injurious, they

¹ *Lafferty v. Jelley*, 22 Ind. 471. Such a fee is held champertous in Michigan. *Backus v. Byron*, 4 Mich. 435. See the opinion of Mr. Justice Green in this case..

² *Davis v. Sharron*, 16 B. Mon. 67.

³ *Key v. Vattier*, 1 Ohio, 132.

must be considered as offenses, whether the State has thought it necessary to punish them or not. * * * In such cases as the one now before us, they might naturally believe that public opinion, aided by the want of a legal remedy to enforce contracts, would afford all the remedy required. However this may be, it is believed that, by omitting to provide a punishment in all cases of champerty, they neither intended to afford them their sanction nor to open their courts for their protection and encouragement." But where, by the terms of an agreement between attorney and client, the compensation of the former was made "wholly contingent upon successfully pursuing the claim," that it was to be made commensurate therewith, liberal, and adequate; and if unsuccessful, he was to receive nothing for his skill, toil, and expenditure of time and money; and after the services were completed, the compensation was fixed by the mutual agreement of the parties, and the sum agreed upon was secured by a mortgage, it was held that the parties themselves having established the value of the services, the compensation could not be withheld on the ground of exorbitance.¹

¹ *McElraith v. Dupuy*, 2 La. An. 520; *Walker v. Cuthbert & Stanley*, 10 Ala. 213, to the same effect.

Where a client gave a note to his attorney for services to be rendered in a certain suit, and at the same time executed an instrument by which he agreed to allow him one-half the damages that might be recovered, it was held that the note and agreement formed but one contract, and that both were champertous and void. (*Dumas v. Smith*, 17 Ala. 305.) The same point was ruled in *Elliot v. McClelland*, *Ibid.* 206.

It is doubtful whether a contract by a client to convey to his attorney a certain portion of a tract of land, the pre-emption right to which is contested, when he shall obtain title, in consideration that the attorney shall render all necessary services to procure the allowance of his client's claim thereto, is not champertous. (*Martin v. Veeder*, 20 Wis. 466.) Compare with *Brent v. Reeves*, 3 La. 10.

An attorney agreed with a father to institute proceedings for the division and sale of land held by the father and his daughter in common, and the father agreed to pay for such services \$500 when the land should be sold and the purchase money become due; or the usual fee in case the attorney should fail to procure the division. The father died after an order for the sale had been entered by the court, but before the sale had taken place; and the guardian of the daughter had the case dismissed. Held, that the attorney was only entitled to the usual fee for his services, on the ground that where the law casts a duty upon a party, the performance shall be excused by the act of God; but where a party by his own contract engages to do an act, it is deemed his own fault that he did not exempt himself from responsibility in certain events. (*Bunn v. Prather*, 21 Ill. 219.)

§ 352. Contracts held not champertous.—Although there was no statute in reference to champerty in New Hampshire, in 1862, and the common law prevailed there, it has been determined that an attorney may render services and advance money in carrying on a lawsuit for a man without property, upon an agreement that he shall be first paid from the funds recovered ; and this is not either maintenance or champerty. The court said : “ We are not prepared to say that the law relative to maintenance and champerty is not part of our law. The evils against which those laws were designed to guard are as likely to spring up here as elsewhere, if those safeguards were removed. But we think that the law might be administered in a very different spirit here at this day from what it is supposed to have been in a different state of society. So long as the law gives countenance and encouragement to the employment of attorneys and counsel to aid suitors in the prosecution and defense of their supposed rights, it cannot be deemed maintenance for professional men to render their services to those who need them for the usual and customary compensation. Nor is it material whether the party is in good credit and able to pay for those services as the case proceeds, or whether the counsel has to rely for his compensation on the success of a cause he believes to be well founded. It is usual, and in many cases unavoidable, that the expenses incident to a controversy are paid by the attorney in the cause. Such advances are constantly recovered in actions for costs, and there can be no pretense that the payment of such proper and needful expenses in good faith constitutes maintenance, whether they are expected to be paid at once, or from the proceeds of the cause.”¹

An agreement between an attorney and client, that the former shall investigate the records of titles to real estate, and decide between conflicting titles as to which is the best, acquire such titles and bring suit for the recovery of them, and when successful, that the profits shall be divided between attorney and client, the former furnishing skilled labor, the latter capital for the purchase of the titles, etc., is not tainted with crime or against any statute of the State of Illinois. Nor are contingent fees to

¹ *Christie v. Sawyer*, 44 N. H. 303; *Shapley v. Bellows*, 4 *Ibid.* 355.

attorneys in that State against law and public policy. "We are aware of no law or public policy in this State," say the court, "which would deprive a person, claiming a right, from contracting to pay for legal services in vindicating it a stipulated portion of the thing or of the value of the thing when recovered, dependent solely upon such recovery, instead of paying or contracting to pay, absolutely, a sum certain." Maintenance, as defined and punished in Illinois, by statute, has abolished the common-law offenses of champerty, barratry, etc., and now consists in officiously intermeddling in a suit and furnishing means for its prosecution, *with a view to promote litigation*.¹

In California, a contract entered into between a client and an attorney, in which the attorney undertakes to resist a motion for a new trial, etc., and to receive for his services a portion of the land, has been held not *contra bonos mores*, if no concealment or improper practices were to be used, or were in fact used by the attorney in performing the contract on his part. A court of equity will not, for the want of mutuality, refuse to enforce the specific performance of a contract between an attorney and client, by which the attorney undertakes to give such professional services on such conditions. Nor if, in such a case, the attorney, after performing some service, is absent when the case is called in court, and the client employs another attorney to assist in the matter, and the client waives a full performance of the contract, if he still continues to recognize the former as attorney and avails himself of his service. If an attorney asks the specific performance of a contract to convey to him land for his professional services, and the client has employed other counsel to assist, in the absence of the attorney, equity will not allow the client compensation for the services of the counsel, and the amount of the compensation is the value of the services rendered.²

¹ Newkirk v. Cone, 17 Ill. 449.

² Ballard v. Carr, 48 Cal. 74. A promise of a conditional fee to an attorney at law for his services in a case, to be paid in the event of a decision in favor of the obligors, though made after he had been retained in the case, is legal and for a sufficient consideration, and the amount may be recovered if the condition be fulfilled. (Henry Clay v. Ballard, 9 Rob. La. 308.)

"Whether it was originally wise to invest the due compensation of counsel with the incidents of legal demand, and whether the dignity, and with it the

§ 353. **Maintenance and barratry.**—C, being about to leave the State, claimed to have a demand against M, which he wished to have prosecuted. It was thereon agreed between the plaintiff and defendant and C, that the latter should assign his claim to the plaintiff, and that the defendant should prosecute the demand as attorney, in the plaintiff's name, but the plaintiff was to have no interest in the moneys recovered. The defendant agreed to pay the plaintiff \$50, whenever the action was determined, together with his necessary expenses in attending court. His compensation for the time spent in attending court was to be included in the \$50, and he was to be saved harmless from all costs and expenses of the litigation. The court held that although this agreement came exactly within the general definition of maintenance, so far as the plaintiff was concerned, yet that it did not fall within the terms of the revised statutes which abolished all maintenance, (except taking a conveyance of lands in suit, or selling pretended titles, or conspiracies falsely to show or maintain suits) and being in no respect contrary to any existing law, it could be enforced. It was held also that the plaintiff, when he entered into the agreement with the defendant, was *not* guilty of doing an illegal act; and it was not

usefulness, of the profession might not have been better secured by leaving its members to a merely honorary recourse, has divided the opinions of intelligent and honest thinkers. But the question is now, and has long been, merely a speculative one in Pennsylvania, and our courts have either to remodel the law, or to enforce it as it stands, by admitting the lawyer to sue for his *quantum meruit*.

"So, too, the practice which has obtained to a considerable extent, of stipulating beforehand for professional fees, contingent on the result of the litigation. It is not a practice to be generally commended, exposing honorable men, not unfrequently, to misapprehension and illiberal remark, and giving the apparent sanction of their example to conduct which they would be among the foremost to reprehend. Such contracts may sometimes be necessary in a community such as that of Pennsylvania has been, and perhaps, as it is yet; and where they have been made in abundant good faith, *uberrima fide*, without suppression or reserve of fact, or exaggeration of apprehended difficulties, or undue influence in any sort of degree; and when the compensation bargained for is absolutely just and fair, so that the transaction is characterized throughout by 'all good fidelity to the client,' the court will hold such contracts to be valid. But it is unnecessary to say, that such contracts as they can scarcely be excepted from the general rule, which denounces as suspicious the dealings of fiduciaries with those under their protection, and must undergo the most exact and jealous scrutiny before they can expect the judicial ratification." (Ex parte Plitt, 2 Wall. Jr. C. C. 279, Per Kane, J.)

barratry on his part, because it was but a single instance, and that offense consists in the habit or practice of stirring up strife. And further, that the case did not fall within the provisions of the revised statutes forbidding attorneys, etc., buying rights in action to prosecute, or lending money to procure suits.¹

§ 354. Contingent fee not within the Statute of Frauds.

There is no principle of law that prevents a creditor, upon a good consideration, from making the payment of his claim dependent upon a contingency; nor is there any statute that requires an agreement to that effect to be in writing. An attorney, therefore, can make a valid agreement with his client, by which his right to recover fees already due for his services is made contingent upon his success in the action. Such an agreement has a valid consideration, consisting both of prospective advantage to himself, and of hazard and expense to his client. It is not, in any sense, a "promise to answer for the debt, default, or miscarriage of another," and is not within the provisions of the Statute of Frauds.²

§ 355. Right to contingent fee as against attaching creditor of client.—An agreement between attorney and client that the former should have \$100 for his services "out of the verdict" in and for unliquidated damages arising from a tort, operates as an assignment to that extent of the sum recovered, and is good against an attaching creditor of the client. It may be observed that the court in this case declared that the attorney had no *lien* on the fund recovered, but that the agreement operated as an assignment.

It is true that a claim for unliquidated damages in an action sounding in tort is not capable of assignment before verdict. But it is true only in respect to the rights of third parties. As between attorney and client, an assignment, or agreement to assign the whole or part of a future verdict, would be binding, and, being founded on sufficient consideration, would be enforced. "Such agreements between counsel and client are common; more frequent, indeed, than they ought to be. They have more than once attracted the animadversion of this court; but

¹ Voorhees v. Dorr, 51 Barb. 580.

² Fitch v. Gardenier, 2 Keyes, 516.

they bind the parties, and the attaching creditor of one of the parties succeeds to no higher rights than he possessed.”¹

§ 356. Contingent fee—Contract of indemnity.—A contract by an attorney to save his client harmless from all responsibility in a suit pending against him or to refund his fee, if valid, extends only to such liabilities as the law would recognize and enforce; and if the client suffers a judgment to be rendered against him in favor of another attorney whom he had never employed for professional services in the same suit, he cannot resort to his contract of indemnity.²

§ 357. Right to compensation—Contract—Merger.—A simple contract that an attorney should have one moiety in fee of the lands he should recover for his client, is merged in a bond subsequently executed, that the attorney should, on a certain contingency happening, reconvey the whole of the premises to his client.³

§ 358. Contingent fee—Death of Client.—Where a contract was made with an attorney for the prosecution of a claim for a stipulated proportion of the amount recovered, and the attorney rendered certain services under such contract, the death of the client did not dissolve the contract, but the compensation remained a lien upon the money when recovered.⁴

§ 359. Contingent fee—Commissions for collecting.—An attorney may in some localities stipulate for a commission or percentage on collections to be made, and is entitled to such fees therefor as his client may agree to pay him.⁵

And where an attorney received notes from an agent, who agreed to pay him one-fourth of the amount collected, and the principal settled with the attorney giving a contract which substantially agreed to comply with the agent's terms; the attorney was allowed to recover for the service actually rendered at the

¹ *Patten v. Wilson*, 34 Pa. 299.

² *Lindsey v. Jones*, 23 Ala. 835.

³ *Mott v. Harrington*, 12 Vt. 199.

⁴ *Wylie v. Cox*, 15 How. 415.

⁵ *Flower v. O'Connor*, 7 La. R. 207; *Butterworth v. Kinsey*, 14 Tex. 500.

rate of twenty-five per cent. on the amount collected, that being the rate of agreement with the agent.¹

When an attorney's fee is contingent upon his success in collecting money for his client, the fee not being demandable until the money is collected, the Statute of Limitations begins to run not from the date of the judgment obtained, but from the time the money is finally paid.²

§ 360. Right to compensation — How far protected against fraudulent assignment of chose in action.—An attorney's claim to compensation out of a judgment rendered in a suit in which he has been employed, will be protected against a fraudulent assignment of the chose in action, if the assignee has notice of the attorney's claim. And if, while the suit is yet in progress, the assignee should compromise the claim and receive the money, he will be held liable for the attorney's bill.³

If an attorney's fee is made contingent on success, and his client settles the suit without the attorney's consent, the attorney can recover what his services are worth on a *quantum meruit*.⁴

§ 361. Contingent fee—Compromise of suit—Measure of damages.—Where a client conveyed to an attorney, as his fee for services to be rendered, a chattel, her title to which she declined to warrant, and afterward she compromised the suit, and the chattel was included in the compromise; the proper criterion of damages (fee) due to her attorney was held to be the actual value of her right, title, and interest in the chattel at the time of the conveyance. If she had but a naked legal title, the damages should have been but nominal.⁵

§ 362. Compensation of substitutes.—It has been said that where an attorney who has been employed to render professional services procures another to represent him and perform them for him, and who does so with the consent of his client;

¹ *Butterworth v. Kinsey, supra.*

² *Morgan v. Brown*, 12 La. An. 159.

³ *Christie v. Sawyer*, 44 N. H. 298.

⁴ *Quint v. Ophir*, 4 Nev. 305.

⁵ *Whitehead v. Ducker*, 11 Smedes & M. 98.

in that case the services in contemplation of law are rendered by the attorney who was employed to perform them, though actually performed by another, upon the principle of the maxim, *qui facit per alium facit per se*, and he may recover on the contract the price stipulated for their performance. And the client having accepted the services of the representative in lieu of those of the attorney represented, cannot afterward object that they were not performed by the latter in person. It was upon this principle that the case of *Allcorn v. Butler*, 9 Tex. 56, was decided. "It is not upon the supposed right which an attorney has to substitute another in his place without the consent of his client; for no such right is recognized. The contract being personal in its character, must be performed by the attorney who has been employed, and has undertaken to perform it in person, unless the client consents to its performance by another."¹ But if he does so consent, and accepts performance by another, it would be to sanction a breach of honesty and good faith to permit him afterward to raise the objection which he did not make at the time. In such a case the attorney whose services were contracted for is entitled to recover on the contract as having performed it on the principle of the maxim before quoted.²

Where an attorney is employed by a party, the law implies a contract between them; and before a new partner can be made a party to such contract, there must be some agreement or understanding to place him in a position which will enable him to make a claim against the client, for services in the suit. In the absence of proof of such an agreement, or the substitution of the firm as the attorneys or counsel of the party, the relation of attorney and client does not exist between the firm and such party with the assent of the latter, and consequently the attorney originally employed may recover for his services in the suit, in an action brought by him alone.³

§ 363. Taking new security pending relation.—A court of equity will not enforce in favor of a solicitor a security taken

¹ *Morgan v. Roberts*, 38 Ill. 65.

² *Ratcliff v. Baird*, 14 Tex. 44; *Allcorn v. Butler*, 9 Ibid. 56. See *Fenno v. English*, 22 Ark. 170.

³ *Davis v. Peck*, 54 Barb. 423.

from his client pending a suit for anything beyond the sum actually due the solicitor. "Transactions between solicitor and client are always scrutinized with a jealous eye, and a court of equity will not suffer a solicitor to take a security from his client pending a suit for a single shilling, by way of gratuity, however reasonable this might be in many cases."¹ In the case of *Wood v. Dounes*, 13 Ves. 120, it was held that beneficial contracts and conveyances, obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, should stand as a security only for what was actually due. So in *Hylton v. Hylton*, 2 Ves. Sr. 547, 259, it is laid down as clear law that no attorney can take anything from his client pending the suit, save his demand.²

§ 364. Of the right of an attorney to make new contracts with the client for compensation after retainer.

The question whether an attorney, during the relation between his client and himself, can make with his client a binding contract to secure to himself greater compensation for his services than was agreed on when the relation commenced, has been decided in the negative. The question has often been determined in England. There it is a settled doctrine of equity that an attorney cannot, while the business is unfinished in which he had been employed, receive any gift from his client, or bind his client in any mode to make him greater compensation for his services than he would have a right to demand if no contract should be made during the relation. If an attorney accept a gift from one thus connected with him, it may be recovered in the court of chancery by the donor or his creditors, should it be necessary to them to assert a right to it to satisfy their demands. If a bond or any security for a greater compensation be taken from a client by his attorney, it will, upon application to a court of equity, be either set aside, or allowed only to stand as security for the sum to which the attorney would have been entitled if no such security had been given. In some cases, the prohibition comprehends all dealings between attorneys and their clients; in others it is confined to the particular business which was the

¹ *Saunderson v. Glass*, 2 Atk. 257.

² *Mott v. Harrington*, 12 Vt. 199.

inducement to form the relation, and an attorney is allowed to enter into contracts with his client upon any matter which is not the object of his concern as attorney.¹ But after the relation has ceased, attorneys have a right to take what may be given them, or paid, as compensation. Their employment in one suit does not deprive them, while it is pending, of their right to make a contract for compensation for their services in another, or for any other professional business with the same client.²

§ 365. Withdrawal from case.—An attorney who withdraws from a case with the consent of his client does not thereby lose his right to compensation for the services already rendered, unless, at the time of his withdrawal, he waives or abandons his claim to compensation.³ And if an attorney, who had been employed at an annual salary, and has resigned his appointment, continues, with the approbation of his former clients, his attention to the suits which originated during his term of office, and his services are shown to have been useful, he may recover compensation therefor.⁴

When attorneys who are employed under a special contract to prosecute a suit abandon the cause before its termination, they are thereby deprived of any claim under the contract, and must be left to recover such fees and compensation as they are reasonably entitled to, on the basis of a *quantum meruit*, and by abandoning the contract they will lose, besides, whatever lien upon the proceeds of the suit they might have had under its provisions. And when a party engages the services of a particular lawyer, or of an association of lawyers, he is entitled to the services of every one of them, and if one abandons the retainer with the assent of the others, express or implied, or they attempt to supply his place with another attorney of equal or superior qualifications, it will be no performance of the contract.⁵

The liability of an attorney and his incapacity to support an action for costs are limited by circumstances. Where, in an action by an attorney for his bill of costs for conducting a chancery

¹ *Lecatt v. Sallee*, 3 Port. 115.

² *Lecatt v. Sallee*, 3 Port. 115.

³ *Coopwood v. Wallace*, 12 Ala. 790.

⁴ *Carter v. New Orleans, etc.*, 5 Rob. (La.) 33.

⁵ *Morgan v. Roberts*, 38 Ill. 65.

suit, it appeared that the attorney had conducted the cause up to the time of obtaining the master's report, and had made repeated but ineffectual attempts to procure money from his client to carry on the proceedings, Tenterden, C. J., said: "It was not to be expected that a solicitor should continue to conduct a cause for an indefinite length of time, after repeated applications for money without effect."¹ But in another case it was said by Lord Eldon that a solicitor going a certain length in a cause cannot leave it there, but must go on.²

§ 366. Dismissal from case—Effect on compensation.—

Where an attorney is employed for a stipulated fee to prosecute a suit to final judgment, and is afterward dismissed by his client without any fault on his own part, he is entitled to recover for the services already rendered, and the court seemed to have some doubt whether he would not be entitled to recover the whole amount stipulated to be paid. "The relation of attorney and client is a confidential and peculiar relation. It is incompatible with that relation for the attorney to accept the employment or the confidence of both parties. And after accepting an employment, and enjoying the confidence of one of them, though afterward discharged by his client without cause, the attorney cannot in general with propriety accept an employment by the opposite party in the same case. This consideration would seem to afford a good reason why such contracts should be excepted from the rule to which we have adverted," (that a readiness or tender to perform is not equivalent to performance) and the attorney be entitled to recover the full amount of the fee for which he had contracted from his client who had wrongfully prevented him from performing his contract.³ And so also in another case it was decided that if an attorney was dismissed without cause, and kept himself ready to fulfill his part of the contract by a continuing tender of his services, he could recover the whole amount stipulated to be paid. As where an attorney was employed to defend a party upon a criminal charge upon a fee to be paid after such services were rendered; and

¹ Rowson v. Earle; sittings in London, Oct. 28th, 1829.

² 14 Ves. 196; Mordecai v. Solomon, Sayers, 172.

³ Myers v. Crockett, 14 Tex. 259.

upon tendering such services was told by his client that he would no longer need his services, as other counsel were retained; whereupon the attorney informed him he was ready to comply with his contract, and would make *him* do so, but afterward volunteered in the prosecution, and rendered his professional services against the defendant. The court held that the attorney could hold the client to his contract by a continuing tender of his services and a readiness to perform his part of the contract until the case was ended; but if, instead of so doing, the attorney entered upon the other side of the case, this would be an abandonment of the contract and a release of the client from its obligation, and the attorney could recover no fee on the contract. To entitle him to a fee, the attorney must have kept himself in readiness to serve his client.

This consequence is not avoided by the tender of the attorney's services at the time he was discharged, for the client might have changed his mind as his case progressed, and have called him in to his assistance, as he would have the right to do if the attorney still insisted on his contract.¹

§ 367. Compensation.—Change of attorney.—Where an application is made by a party in an action to change his attorney, and the court orders a reference to ascertain the amount due to the attorney from his client for professional services, and, upon the coming in of the referee's report fixing the amount to be paid, the client withdraws his application for a change, the court has no power, summarily to order such amount paid by the client to the attorney, by proceedings in the nature of an attachment for contempt. Although good faith would seem to require that the party, after resorting to the aid of the court for a change of attorney, should pay the amount reported due to the attorney, the court can only regard it as a debt for professional services liquidated by the referee, under the order of the court, leaving the attorney, upon withdrawal of the application, to collect the amount of such indebtedness by action, or to take such other proceedings as he shall be advised. If the client had not withdrawn his application for a change, the court

¹ Cantrell v. Chirm, 5 Sneed, 116.

would have ordered the liquidated amount to be paid by the client as a matter of course.¹

§ 368. Lien of attorneys on sums recovered—Costs.—

An attorney has a lien on a sum recovered in a cause, for his bill of costs. If the money come to his hands he may retain it to the amount of his bill; he may stop it *in transitu* if he can lay hold of it, and if he apply to the court, the latter will prevent it from being paid over, till the demand is satisfied.² An attorney has a lien for his bill of costs on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice, from the party against whom the execution issued, to retain the money in his hands, and that the court would be moved to set aside the judgment for irregularity.³ So, an attorney has a lien upon a sum awarded in favor of his client, as well as if recovered by judgment, and if, after notice to the defendant, the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself. He is not prejudiced either, by the collusive release from the plaintiff to the defendant.⁴ Where, after the payment of money into court by the defendant in an action, the plaintiff proceeded and recovered a verdict for a greater sum, and then became bankrupt, the court ordered so much of the money paid into court as was sufficient for the purpose, to be paid to the plaintiff's attorney, in satisfaction of his bill of costs, after taxation, and the residue to the plaintiff's assignees.⁵ In chancery, solicitors have a lien on the funds for their costs, whether in the way of suit or prosecution in lunacy or bankruptcy.⁶ A solicitor prosecuting a suit to a decree, has a lien on the estate recov-

¹ Gardner v. Tyler, 5 Abb. Pr. N. S. 33, affirming S. C. 36 How. Pr. 63.

² Turwin v. Gibson, 3 Atk. 719; Welsh v. Hole, 1 Doug. 338.

³ Griffin v. Eyles, 1 H. Bl. 122.

⁴ Ormerod v. Tate, 1 East, 464. See, under the English system as to the effect on the lien of non-taxation of Bill of Costs, De Bay v. Griffen, Law Rec. 10 Ch. Ap. 291; S. C. 12 Moak's Eng. R. 731. Effect of lien on production of documents after change of attorney, Vale v. Oppert, Law Rep. 10 Ch. Ap. 340; S. C. 12 Moak's Eng. R. 748; Belaney v. Ffrench, Law Rep. 8 Ch. Ap. 918; S. C. 7 Moak's Eng. R. 471.

⁵ Ouston v. O'Bryan, Barnes, 145.

⁶ Ex parte Bryant, 2 Rose, 237; 2 Ves. 407; Lann v. Church, 4 Madd. 391.

ered, on the party recovering the estate for his bill, but not on the heir, unless it is necessary to revive the suit, in which case the lien is revived.¹ The lien of a solicitor upon a fund in court, which is the result of the proceedings, cannot be defeated by the subsequent insolvency of the client; the assignees of the insolvent can only take his property, subject to the claims by which it was affected against him.²

An attorney has a lien on a judgment not only for the actual costs, but for any portion of the damages which may have been agreed upon, for his compensation; but he has no lien until the judgment is entered, or at least until after verdict. To protect the lien, the attorney should give notice to the judgment-debtor. Where the judgment is satisfied without reference to the attorney's lien, it is said that the proper practice is to apply to the proper court to set aside the satisfaction of judgment, and not for the attorney to himself issue an execution. Still, where the judgment is for costs only, this may in itself be legal notice of the lien, which can be discharged only by payment to the attorney.³ A solicitor is entitled to a charge for his costs on property the subject of a successful suit conducted by him against an incumbrancer, although the incumbrance be entirely valueless, provided it formed a cloud upon the title. It is no objection to an application for such a charge that it is made in a suit which is no longer pending, and which was never brought to a hearing, nor that the property has been sold before the application of the solicitor, especially where the purchaser knew there was a pending suit, and that costs might have been incurred in it; he ought to have inquired whether the solicitor had been paid.⁴ And it is held in Tennessee that where by law the attorneys in a cause have a lien upon property involved in litigation for their fees, the *lis pendens* is a general notice of such lien, and the client cannot, by a transfer *pendente lite*, defeat the claim.⁵

¹ Barnesley v. Powell, Anstr. 102. See Turwin v. Gibson, 3 Atk. 720; Fairland v. Eneror, Dick. 114.

² Ex parte Moule, 5 Madd. 462.

³ Crotty v. Mackenzie, 52 How. Pr. 54; Marshall v. Meeks, 51 N. Y. 140; Pulver v. Harris, 53 N. Y. 73; Leshner v. Roessner, 3 Hun, 217; Welsh v. Hole, 1 Doug. 238; Ackerman v. Ackerman, 14 Abb. Pr. 229; Bishop v. Garcia, Ibid. N. S. 72. But see Sweet v. Bartlett, 4 Sand. 661.

⁴ Jones v. Frost, L. R. 7 Ch. Ap. 773; S. C. 3 Moak. Eng. Q. 622.

⁵ Hunt v. McClanahan, 1 Heisk. 503.

It may be stated, as to the attorney's general lien, that the claim should arise from professional employment; that the lien can be commensurate only with the right of the client; that if papers are delivered for a specific purpose, the lien cannot usually extend beyond that purpose; that the lien is frequently subject to the equitable right of set-off, and it may be waived by a contract which is inconsistent with that on which the lien is founded, or by an express contract.

§ 369. Two kinds of lien—general and particular.—

Attorneys are allowed two species of lien as security for the payment of their compensation and costs: the particular or "charging lien" on the property of the client, on account of labor bestowed or money expended in regard to that particular property; and secondly, a general lien for the balance due them on account of their professional services.

The particular lien is not confined to the single deed, document, or paper which the attorney is employed to prepare, but attaches on all deeds, papers, and documents of the client coming to his hands in the regular course of business in the transaction for which he is employed, whether for the purpose of perusal, copying, abstracting, or merely exhibiting to a witness on the trial.¹ This lien on deeds and other documents is of very ancient date.²

The particular lien also attaches to the fruits of a judgment or decree which the attorney's services have obtained.³ But it is said he has no lien on a cause till judgment is entered.⁴ The lien attaches to money payable to the client under the judgment,

But an attorney who acts as assignee has no power to apply trust funds to the payment of his professional services rendered in the administration of the trust. (*Winn v. Crosby*, 52 How. Pr. 174.)

It has been held in England that an attorney has no lien upon a judgment for real estate (*Shaw v. Neale*, 6 H. L. Cas. 581, overruling *Barnesley v. Powell*, Amb. 102); but in New York, in a partition case, where the real estate was sold and the proceeds brought into court, the attorney was allowed a lien upon them. (*Creighton v. Ingersoll*, 20 Barb. 541.)

¹ *Hollis v. Claridge*, 4 Taunt. 809; *Friswell v. King*, 15 Sim. 191.

² 1 Doug. 104; *Spark v. Spicer*, 1 Ld. Raym. 738, 322.

³ *Ex parte Price*, 2 Ves. Sr. 407; *Turwin v. Gibson*, 3 Atk. 720; *Mitchell v. Oldfield*, 4 Term Rep. 123; *Read v. Dupper*, 6 Term Rep. 361; *Randle v. Fuller*, Ibid. 456; *Skinner v. Sweet*, 3 Madd. 244.

⁴ *Potter v. Mayo*, 3 Greenl. 34; *Vetchell v. Clark*, 5 Mass. 309; 2 Vt. 97.

or by virtue of an award,¹ or paid or payable into court in the course of an action at law or in equity,² or to real estate recovered by a solicitor prosecuting a suit in equity to a decree;³ and the lien has been held to attach on sums received or payable upon compromises, even where the verdict and judgment were against the client, on the ground that the money is the fruit of the labor and skill of the attorney.⁴ The lien for costs does not usually extend beyond the costs in the particular action which created it, although a general lien on the fund in court is sometimes recognized.⁵

The particular lien only attaches on the general result or balance of the costs of the cause, and may therefore be defeated by a counterclaim for costs held by the losing party against the successful one,⁶ or even by a private bona fide compromise between the parties.⁷ This destruction of the lien by a set-off seems, however, to be a doctrine that has obtained in England chiefly in the Courts of Chancery and of Common Pleas. In the former, the lien for costs appears only to attach on the general balance due after adjusting the equitable rights of the parties, whether in regard to counter claims for debts or for costs;⁸ and this practice has also been adopted there in the Court of Common Pleas in numerous cases.⁹ But in the Court of Queen's Bench the lien of an attorney for costs in an action cannot be defeated by the party liable to pay in such action being entitled to receive costs in a counter action, even although the attorney be concerned in both actions.¹⁰

¹ *Tabran v. Horn*, Mees. & R. 228; *Omerod v. Gate*, 1 East, 404; *Heacht v. Chipman*, 2 Aiken, 162.

² *Irving v. Viana*, 2 Younge & J. 70.

³ *Barnsley v. Powell*, Amb. 102.

⁴ *Davis v. Lowndes*, 3 Com. B. 827; *Hopewell v. Amwell*, 2 Halst. 4.

⁵ *Lann v. Church*, 4 Madd. 391; *Hall v. Laver*, 1 Hare, 571.

⁶ *Howell v. Harding*, 8 East. 362; *Fijes v. Adams*, 4 Taunt. 632.

⁷ *Welsh v. Hole*, 1 Doug. 238.

⁸ *Taylor v. Popham*, 15 Ves. Jr. 72; *Ex parte Rhodes*, Ibid. 539.

⁹ *Schoole v. Noble*, 1 H. Black. 23; *Núñez v. Modigliani*, Ibid. 217; *Roberts v. Mackoul*, 2 Blackst. 827; *Vaughan v. Davies*, 2 H. Black. 440; *Symonds v. Mills*, 8 Taunt. 526; *Webber v. Nicholas*, 5 L. J. P. C. 19; *Hall v. Ody*, 2 Bos. & P. 28; *Emden v. Darley*, 1 New Rep. 22.

¹⁰ *Mitchell v. Oldfield*, 4 Term Rep. 124; *Moreland v. Pasley*, 2 H. Black. 441; *Randle v. Fuller*, 6 Term Rep. 456; *Glaister v. Heaver*, 8 Ibid. 70; *Middleton v. Hill*, 1 Maule & S. 240; 1 Dowl. & R. 168.

Lord Mansfield says: ¹ "An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it *in transitu*, if he can lay hold of it. If he apply to the court they will prevent its being paid over till his demand is satisfied. I am inclined to go still further, and to hold that if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice." Courts have prevented parties to a cause from defeating an attorney's claim by private arrangements.² Yet the courts dislike to interfere at the instance of the attorney to prevent the parties from amicably adjusting a contested case;³ but where the attorney's only chance of payment depends upon the result of the cause, the courts will not allow even a release obtained from the plaintiff pending the proceedings to be set up to defeat the claim, unless the proceedings are taken by an unauthorized attorney when they may be adjusted without the concurrence of the attorney.⁴

§ 370. The particular or charging lien.—Under the common law in England, an attorney or solicitor is entitled to recover his taxable costs from a fund recovered by his aid, both in legal⁵ and equitable proceedings.⁶ The lien attaches on the

¹ *Welsh v. Hole*, 1 Doug. 338. See, also, *Read v. Dupper*, 6 Term R. 361; *Bradt v. Koon*, 4 Cowen, 416.

² *Moore v. Angell*, 11 Jur. 485; *Talcott v. Bronson*, 4 Paige, 501.

³ *Ex parte Hart*, 1 Barn. & Adol. 666; 1 Dowl. 324; *Quested v. Lallis*, 10 Mees. & W. 18; 1 Dowl. N. S. 888; 11 Law J. N. S. Ex. 345; *Clark v. Smith*, 1 Dowl. & L. 960; *Talcott v. Bronson*, 4 Paige, 501.

⁴ *Ex parte Hart*, 1 Barn. & Adol. 666; 1 Dowl. 324; *Quested v. Lallis*, 10 Mees. & W. 18; 1 Dowl. N. S. 888; 11 Law J. N. S. Ex. 345; *Clark v. Smith*, 1 Dowl. & L. 960; 6 Man. & G. 1051; 13 Law J. N. S. C. P. 97; *Talcott v. Bronson*, 4 Paige, 501; *Wright v. Burrough*, 3 Com. B. 344; 4 Dowl. & L. 226; *Davies v. Lowndes*, 3 Com. B. 827; *Ex parte Bryant*, 2 Rose, 237; 1 Madd. 49; *Worrall v. Johnson*, 2 Jacob & W. 218; *Matter of Southwick*, 1 Johns. Ch. 22; *Abbott v. Rice*, 3 Bing. 132; 2 Paige, 276.

⁵ *Turwin v. Gibson*, 3 Atk. 720; *Kellett v. Kelley*, 5 I. R. Eq. 274; *Bawtree v. Watson*, 2 Keen, 713; *Skinner v. Sweet*, 3 Madd. 244.

⁶ *Barker v. St. Quentin*, 12 Mees. & W. 461; *Vaughn v. Davies*, 3 T. R. 665; *Smith v. Winter*, 18 Week. R. 447; *In re Freehold Co.*, 21 Law T. N. S. 195; *In re Bank of Hindustan*, 3 Law R. Ch. 125; *In re Jeff. Davis*, Law Rep. Adm. 1.

fruits of a judgment or decree.¹ It attaches to the money payable to the client thereunder, or by virtue of an award,² and to money paid or payable into court in the course of an action or suit, or in any other way, if the proceeds of the labor and skill of an attorney.³ The lien has been held to attach on sums received or payable by way of compromise, to the client in a cause, even where the verdict and judgment are against him; for the money is regarded as the fruit of the attorney's labor and skill, especially if he has taken up the cause of a poor person.⁴

In the United States, the doctrine of the "charging lien" of the attorney appears to have been pushed in some courts quite as far as in England. The United States Supreme Court has decided that an attorney employed to prosecute a claim before a commission for a contingent fee of five per cent. had a lien for this amount on the fund recovered, and such a one as the court would enforce by a bill in equity.⁵

In several State courts, the lien has been held to cover, not merely costs and advances, but fees.⁶ In some States, the lien is regulated by statute.⁷ In others, the lien is totally denied; but the lawyer has a right to deduct from funds in his hands.⁸

In still other courts the lien is limited in its extent to statutory costs and disbursements.⁹ It seems tolerably well settled

¹ *Ex parte Price*, 2 Ves. Sr. 407; *Turwin v. Gibson*, 3 Atk. 720; *Mitchell v. Oldfield*, 4 T. R. 123; *Read v. Dupper*, 6 T. R. 361; *Randle v. Fuller*, *Ibid.* 456; *Skinner v. Sweet*, 3 Madd. 244.

² *Tabran v. Horn*, *Moody & R.* 228; *Omerod v. Gate*, 1 East, 404.

³ *Irving v. Viana*, 2 Y. & Jer. 70; *Barnesley v. Powell*, Amb. 102.

⁴ *Davis v. Lowndes*, 3 Com. B. 827; *Hopewell v. Amwell*, 2 Halst. 4.

⁵ *Wylie v. Cox*, 15 How. 415.

⁶ *Stratton v. Hussey*, 62 Me. 286; *Newbert v. Cunningham*, 50 Me. 231; *Cooley v. Patterson*, 52 Me. 472; *Andrews v. Morse*, 12 Conn. 444; *Benjamin v. Benjamin*, 17 Conn. 110; *Walker v. Sargeant*, 14 Vt. 247; *Hutchinson v. Howard*, 15 Vt. 544; *Hutchinson v. Pettes*, 18 Vt. 616; *Power v. Kent*, 1 Cowen, 172; *Martin v. Hawks*, 15 Johns. 405; *Rooney v. R. R.*, 18 N. Y. 368; *Bowling Green Bank v. Todd*, 52 N. Y. 489; *Sexton v. Pike*, 13 Ark. 193; *Waters v. Grace*, 23 Ark. 118; *Carter v. Davis*, 8 Fla. 183.

⁷ See *Baker v. Cook*, 11 Mass. 236; *Citizens' Bank v. Culver*, 54 N. H. 327.

⁸ *Hill v. Brinkley*, 10 Ind. 102; *Frissell v. Haile*, 18 Mo. 18; *Irwin v. Workman*, 3 Watts, 357; *Walton v. Dickerson*, 7 Pa. 376; *Dubois' Appeal*, 38 Pa. 231; *Newbaker v. Alricks*, 5 Watts, 183. See *Getchell v. Clark*, 5 Mass. 309; *Simmons v. Almy*, 103 Mass. 33.

⁹ *Wright v. Cobleigh*, 21 N. H. 339; *Young v. Dearborn*, 27 N. H. 324; *Currier v. R. R.*, 37 N. H. 223; *Wells v. Hatch*, 43 N. H. 246; *Cozzens v. Whitney*, 3 R. I. 79; *McDonald v. Napier*, 14 Ga. 89; *Humphrey v. Browning*, 46 Ill. 476; *Elwood v. Wilson*, 21 Iowa, 523; *Ex parte Kyle*, 1 Cal. 331; *Mansfield v. Dorland*, 2 Cal.

that the lien does not attach until judgment.¹ No lien exists in favor of attorneys of distributees on a fund brought into a court of equity or probate for distribution to the parties entitled.²

In England, by the 23 and 24 Vict., chap. 127, sec. 28, in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge, before it has been heard, or is pending, to declare the attorney entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon or against, and a right to payment out of the property of whatsoever nature, tenure, or kind the same may be which shall have been recovered or preserved through his instrumentality, for the taxed costs, charges, and expenses. The court or judge may make such orders for taxation of, or for raising and payment of such costs, charges, and expenses out of the property as may be just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bona fide* purchaser, for value with possession, be absolutely void, and of no effect as against such charge or right; provided, that no such order shall be made in any case in which the right to recover payment of such costs, etc., is barred by any Statute of Limitations.

Since this statute an attorney can only have a charge upon property recovered or preserved by him for his client in respect of the costs in the particular suit or proceeding in which they were incurred, and not for general costs.³ Where a solicitor was employed by the next friend in establishing an infant's title to land, the infant having attained his majority, a court of equity

507; *Dodd v. Brott*, 1 Minn. 270. See *Stephens v. Weston*, 3 Barn. & C. 538; *Hough v. Edwards*, 1 Hurl. & N. 171; *Laun v. Church*, 4 Madd. 391; *Bozon v. Bolland*, 4 Mylne & C. 354; *Perkins v. Bradley*, 1 Hare, 23. See, also, *Dennett v. Cutts*, 11 N. H. 163; *Citizens' Nat. Bank v. Culver*, 54 N. H. 327.

¹ *Potter v. Mayo*, 3 Green, 34; *Hobson v. Watson*, 34 Me. 20; *Getchell v. Clark*, 5 Mass. 309; *Foot v. Tewksbury*, 2 Vt. 97; *Hutchinson v. Howard*, 15 Vt. 247; *Hutchinson v. Pettes*, 18 Vt. 616; *Pinkerton v. Easton*, Law Rep. 16 Eq. 257; *Foxon v. Gascoigne*, Law Rep. 9 Ch. 654; *Sweet v. Bartlett*, 4 Sand. 661; *Henchey v. Chicago*, 41 Ill. 136. See *Hough v. Edwards*, 1 Hurl. & N. 171.

² *McCaa v. Grant*, 43 Ala. 262; *Dubois*, Appeal of, 38 Pa. 231; *In re Lamberston*, 63 Barb. 297.

³ *Thompson*, Ex parte, 3 L. T. N. S. 317; *Wilson v. Round*, 4 Giff. 416; 10 Jur. N. S. 34; 12 Week. R. 402; 9 L. T. N. S. 675.

declared so much of the costs as remained unpaid a charge on the land recovered.¹

A solicitor's lien for costs upon a fund in court recovered by his exertions is independent of the 23 and 24 Vict., sec. 28, and he is entitled to priority in respect thereof over a judgment-creditor who has obtained a charging order before the solicitor.² So a solicitor is entitled to a charge upon property recovered or preserved for his costs of the litigation, by means of which it was recovered or preserved, irrespective of his client's interest in the property, and although it turns out that the latter has not and never had any interest therein.³ An attorney was declared entitled to a charge upon land recovered by him in ejectment; his client having died since the action, the lands being in course of administration, the judge before whom the ejectment was tried not having been applied to, and a court of equity, before whom the case had been brought in another form, having declined to make an order for the common-law costs.⁴

§ 371. The general lien.—In addition to the particular lien, attorneys have a general lien for the balance due to them in *their employment*, but not for other money, as for money lent.⁵

This lien, however, has been said not to be favored at common law; and the reason given is, that it is in restraint of property,⁶ and it does not attach like the particular lien on the fund in court, or the property in dispute,⁷ except in cases of bankruptcy or lunacy, where the general lien for the management of the property attaches on the fund or body of the estate;⁸ but in other cases it attaches only on papers and documents which

¹ Bouser v. Bradshaw, 4 Giff. 260; 9 Jur. N. S. 1048; 9 L. T. N. S. 195.

² Haymes v. Cooper, 10 Jur. N. S. 303; 33 Law J. Ch. 488; 12 Week. R. 539; 10 L. T. N. S. 87.

³ Bailey v. Birchall, 2 Hem. & M. 371; 11 Jur. N. S. 57.

⁴ Ex parte Seaman, 3 Hurl. & C. 148; 10 Jur. N. S. 592; 33 Law J. Ex. Ch. 204; 12 Week. R. 748; 10 L. T. N. S. 345.

⁵ Ex parte Nesbit, 2 Schoales & L. 279; Ex parte Stirling, 16 Ves. 259; Ex parte Pemberton, 18 Ves. 382; Stevenson v. Blacklock, 1 Maule & S. 535; 12 Wend. 261; Worrall v. Johnson, 2 Jacob & W. 218; Dennett v. Cutts, 11 N. H. 163; Walker v. Sargeant, 14 Vt. 247.

⁶ Scarfe v. Morgan, 4 Mees. & W. 285.

⁷ Laun v. Church, 4 Madd. 391; Lucas v. Peacock, 8 Beav. 177; White v. Royal Exchange Assurance Co., 1 Bing. 21.

⁸ Barnesley v. Powell, Amb. 102; Ex parte Price, 2 Ves. Sr. 407.

come into the possession of the attorney or solicitor in the course of his employment as such. It does not attach on documents which he acquires in a different capacity, as *prochein ami* to an infant, for instance,¹ though if they are in his hands for professional services, the particular object for which they were intrusted to him is immaterial,² unless it is expressly agreed to the contrary, or unless there is something in the nature of the transaction which forbids the idea of a lien, as a deposit on a loan of money.³ Here there is only a restricted and qualified possession, and this excludes the idea of a general or specific lien.⁴ But if the property is allowed to remain in an attorney's hands, after the specific purpose for which it is left is fulfilled, the general lien will attach.⁵

As in other cases of liens, the attorney's lien on documents deposited with him by a client will not avail against third parties claiming adversely to the client. The attorney's right of possession, in other words, can be no greater than his client's, and therefore a party receiving title-deeds for the purpose of investigation, with a view to the advance of money on them, cannot, by depositing them in the hands of his attorney, confer upon him a right of detention for the costs of the investigation, if no loan be ultimately made, although it be agreed that the mortgagor should pay all expenses.⁶ And a lien which has attached on title-deeds in the attorney's hands will not extend to cover costs incurred after the interest of the client has been determined. Bankruptcy of the client will prevent any subsequent lien from attaching on his title-deeds in the attorney's hands, and so may

¹ Montague on Lien, 1, 53.

² *Ex parte Sterling*, 16 Ves. 258; *Stevenson v. Blacklock*, 1 Maule & S. 535.

³ *Balch v. Symes*, 1 Turn. & R. 87; *Lawson v. Dickinson*, 8 Mod. 307; *Worral v. Johnson*, 2 Jacob & W. 218.

⁴ *Judson v. Etheridge*, 1 Crompt. & M. 473; *Jackson v. Cummins*, 5 Mees. & W. 542.

⁵ *Ex parte Pemberton*, 18 Ves. 382.

⁶ *Pratt v. Vizard*, 5 Barn. & Adol. 808; 2 Nev. & M. 455; *Hollis v. Claridge*, 4 Taunt. 807; *Symons v. Blake*, 2 Crompt. M. & R. 416; 1 Gale, 182; *Smith v. Chichester*, 2 Dru. & War. 293; *Young v. English*, 13 Law J. Chan. N. S. 76; *Ex parte Nesbitt*, 2 Schoales & L. 279; *Lightfoot v. Keane*, 1 Mees. & W. 745; 2 Gale & D. 138; 16 Ves. 258, 275; 18 Ves. 282; 13 Ves. 161; *House v. Park*, 2 Term R. 376; *Wakefield v. Newbon*, 6 Q. B. 276; *Ogle v. Story*, 4 Barn. & Adol. 735; 1 Nev. & M. 734.

a judgment against the client.¹ The lien extends to costs legitimately incurred by the attorney against the client in enforcing the original claim.² It will avail against the Statute of Limitations,³ and against the assignees of the party who created the lien,⁴ and against his executors or administrators,⁵ and against his creditors proceeding by judgment and execution or by foreign attachment,⁶ and against the client's mortgagor taking a conveyance after the lien had attached to the title-deeds in the hands of the mortgagee's attorney.⁷

§ 372. The attorney's retaining lien.—The books refer to "retaining liens" as a distinct class. They are, I conceive, a species of the general lien. The attorney has a retaining lien on the client's funds in his hands, as a security for his labor.⁸ The lien also extends to papers and documents in the hands of the attorney, and coming to him in the regular course of business.⁹ By the English law the lien is not confined to the single deed or document which he has himself been employed to prepare, but attaches on all the deeds, papers, and documents of his client coming to his hands in the regular course of business, in the transaction in which he is employed;¹⁰ and the lien applies when the papers are given to the attorney for the purpose of perusal, copying, abstracting, or merely exhibiting to a witness on the trial of an action.¹¹

The lien at common law, both in England and America, has

¹ *Ex parte Lee*, 2 Ves. Jr. 285; *In re Dean*, 2 Mont. D. & D. 438; *Ex parte Swinburne*, 3 Dea. 396; *Ex parte Bush*, 7 Vin. Abr. 74; *Oxenham v. Esdaile*, 3 Barn. & C. 225; *Blunden v. Desarte*, 2 Dru. & War. 405.

² *In re Sharpe*, 1 Dowl. 432.

³ *Higgins v. Scott*, 2 Barn. & Ad. 413; *In re Bromhead*, 16 Law J. Q. B. 355; 5 Dowl. & D. 52; *Spears v. Hartley*, 3 Esp. 81.

⁴ *Lambert v. Buckmaster*, 2 Barn. & C. 616.

⁵ *Turner v. Gibson*, 2 Ves. 407.

⁶ *Nathan v. Giles*, 5 Taunt. 558.

⁷ *Ogle v. Story*, 4 B. & Ad. 735; 1 Nev. & M. 474.

⁸ *Wharton on Agency*, secs. 623, 624; *Welsh v. Hale*, Doug. 238; *Miller v. Atlee*, 3 Ex. 799; *Hanson v. Reece*, 3 Jur. N. S. 1204; *In re Paschal*, 10 Wall. 483.

⁹ *Hollis v. Claridge*, 4 Taunt. 809.

¹⁰ *Hollis v. Claridge*, *supra*; *Ex parte Nesbitt*, 2 Schoales & L. 279; *Gibson v. May*, 4 De Gex, M. & G. 512; *Taunton v. Goforth*, 6 Dowl. & R. 384; *Rex v. Williams*, 2 Har. & W. 277; *Rex v. Sankey*, 6 Nev. & M. 839; 1 Doug. 104; *Spark v. Spicer*, 1 Ld. Raym. 322, 738.

¹¹ *Friswell v. King*, 15 Sim. 191.

been held to cover papers placed in the attorney's hands for collection or other professional action, and the client cannot recover the documents back without paying to the attorney all that is due for his services.¹ The lien does not attach to papers received in any other than a professional capacity,² nor will the accidental possession of papers sustain the lien.³

If the papers are delivered to the lawyer for a specific purpose merely, he can have a lien only in respect to such purpose, and not in respect to other transactions.⁴ But if the lawyer is allowed to retain the papers after this specific purpose is abandoned, he may then be entitled to a general lien.⁵

It seems that the attorney, whose authority is revoked pending the suit, will be compelled, if he have no interest in the suit, to surrender the papers, unless the dismissal be unreasonable.⁶

§ 373. Lien on deeds and papers generally.—Every one, whether attorney or not, has, by the common law, a lien on the specific deed or paper delivered to him, to do any work or business thereon, but not on other muniments belonging to the same party unless the person claiming the lien be an attorney or solicitor, and the lien extends to the representative of a deceased

¹ Wharton on Agency, sec. 625; Warburton v. Edge, 9 Sim. 508; 1 Sim. & St. 457; Ex parte Sterling, 16 Ves. 258; Cowell v. Simpson, 16 Ves. 275; Ex parte Nesbitt, 2 Schoales & L. 279; Stevenson v. Blakelock, 1 Moore & S. 535; Friswell v. King, 15 Sim. 191; Kemp v. King, 2 Moody & R. 437; Car. & M. 396; Champer-town v. Scott, 6 Madd. 93; Ogle v. Storey, 1 Moody & M. 474; 4 Barn. & Adol. 735; Dennett v. Cutts, 11 N. H. 163; Howard v. Osceola, 22 Wis. 453; Stewart v. Flowers, 44 Miss. 513; White v. Harlow, 5 Gray, 463; 2 Jacob & W. 218; Blunden v. Desart, 2 Dru. & War. 423; Turner v. Deane, 3 Ex. 839; In re Moss, 35 Beav. 526; Richards v. Platet, Craig. & P. 458. See, *contra*, Walton v. Dickerson, 7 Pa. 376; Dubois' Appeal, 38 Pa. 231. See, also, Newton v. Porter, 5 Lans. 416.

² Wickens v. Townsend, 1 Russ. & M. 361; Bozon v. Bolland, 4 Mylne & C. 354; Ex parte Nesbitt, 2 Schoales & L. 279; 1 Hoff. Ch. 35.

³ In re Moseley, 15 Week. R. 975; In re County Assurance Co., 38 Law J. Ch. 231; In re Pulbrook, Law R. 4 Ch. 627; Berrie v. Howitt, 39 Law J. Ch. 119; Belaney v. French, Law R. 8 Ch. 918.

⁴ Balch v. Symes, 1 Turn. & R. 192; Lawson v. Dickinson, 8 Mod. 306. See Bowling Green Savings Inst. v. Todd, 52 N. Y. 489; Colmer v. Ede, 40 Law J. Ch. 185; Foxon v. Cascoigne, 9 Law R. Ch. 654.

⁵ Ex parte Pemberton, 18 Ves. 282; Ex parte Stirling, 16 Ves. 258.

⁶ Belaney v. French, 43 Law J. Ch. 312; 29 L. T. N. S. 706; Lord v. Wormley, Jacob, 580; In re Faithful, Law Rep. 6 Eq. 325; Farhall v. Farhall, Law Rep. 7 Eq. 286.

solicitor.¹ But the lien which an attorney has is only commensurate with the right which the party delivering the papers to him has therein.² A solicitor, therefore, has no lien against a remainder-man on deeds put into his hands by a tenant for life.³ In chancery, a solicitor has a lien for his costs upon all papers that come into his hands for the purpose of business, though they may not be papers in the cause in which he makes the demand.⁴ The lien on documents does not extend to general debts, but only to what is due in the character of an attorney. Where the attorney had the instrument in his possession upon which the fund depended, and through the medium of which only the money in court could be obtained, it was held that his lien could not be affected by a compromise having taken place, or by the money having been paid into court.⁵

An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment. He has a lien on the papers in a particular suit, not only for his costs in that suit, but for his general costs.⁶ But the attorney's lien is only commensurate with the right which the party delivering the papers to him has therein. It is only co-extensive with the rights of the client, and, therefore, as between the plaintiff and defendant, the lien of the plaintiff's attorney cannot affect the right of the defendant.⁷ Deeds deposited with an attorney for a particular purpose, and after that had failed allowed to remain with him, are subject to the general lien.⁸ But a solicitor has no lien upon the will of his client.⁹ A mortgagee's attorney, having possession of the title-deeds, has a lien upon them for costs due to him from the mortgagee.¹⁰ But it has been held that the attorney of an intended mortgagee has no lien as against the intended mortgagor for the costs of

¹ *Redfearn v. Sowerby*, 1 Swanst. 84.

² *Hollis v. Claridge*, 4 Taunt. 807.

³ *Ex parte Nesbitt*, 2 Schoales & L. 279.

⁴ *Ex parte Nesbitt*, 2 Schoales & L. 279.

⁵ *Worrall v. Johnson*, 2 Jacob & W. 218.

⁶ *Stevenson v. Blakelock*, 1 Maule & S. 535; *In re Broomhead*, 5 Dowl. & L. 52; 16 Law J. Q. B. 355.

⁷ *Symons v. Blake*, 2 Crompt. M. & R. 416; *Hollis v. Claridge*, 4 Taunt. 807.

⁸ *Ex parte Pemberton*, 18 Ves. 282.

⁹ *Balch v. Symes*, 1 Turn. & R. 87.

¹⁰ *Ogle v. Storey*, 1 Nev. & M. 474; 4 Barn. & Adol. 735.

preparing the mortgage upon deeds delivered by the intended mortgagor to the intended mortgagee, and by the latter handed to the attorney for the purpose of investigating the title.¹ Where a mortgagee of lands handed over the deeds to his attorney, and the mortgagor paid the principal and interest, and the lands were reconveyed to him, the court held that the attorney could not retain the deeds against him as security for the expenses due from the mortgagee to the attorney.²

The lien of the attorney remains, though the claim is barred by the Statute of Limitations.³ It is not confined to deeds and papers, but extends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action.⁴ It attaches upon money received by way of compromise, though the verdict and judgment are against the client.⁵ But the attorney has no lien on his client's money in his hands beyond the amount in which the latter is indebted to him.⁶ Where an attorney has a lien upon the papers of two persons jointly, the court will not try the rights of the parties by directing to whom they shall be given up upon the lien being satisfied.⁷ Nor can the lien be affected by reference of the cause and all matters in dispute between the parties.⁸ An attorney having a lien on a deed for the costs of drawing it, is not bound to produce it on a *subpoena duces tecum* for the client.⁹

Where the directors of a company carry on a business not authorized by the deed of settlement, and costs are thereby increased, the solicitors of the company have no lien for their

¹ Pratt v. Vizard, 2 Nev. & M. 455; 5 Barn. & Adol. 808.

² Wakefield v. Newbar, 6 Q. B. 276. See, as to lien on deeds deposited with attorneys by trustees, Lightfoot v. Keane, 1 Mees. & W. 745.

³ In re Broomhead, 16 Law J. Q. B. 355; 5 Dowl. & L. 52.

⁴ Friswell v. King, 15 Sim. 191.

⁵ Davies v. Lowndes, 3 Com. B. 823.

⁶ Miller v. Alter, 3 Ex. 799; 13 Jur. 431.

⁷ Duncan v. Richmond, 1 Moore, 99; 7 Taunt. 391; Esdaille v. Oxenham, 3 Barn. & C. 225; 5 Dowl. & R. 49.

⁸ Cowell v. Betteley, 4 Moore & S. 265; 10 Bing. 432. But see In re Sharpe, 1 D. P. C. 432.

⁹ Kemp v. King, 2 M. & R. 437. As to whether the court can compel the production of papers on which the attorney has a lien, see Gregory v. Creswell, 1 Holt, 17; Commerell v. Paynton, 1 Swanst. 1; Brassington v. Brassington, 1 Sim. & St. 455; Lord v. Wormleighton, 1 Jacobs, 580; Moir v. Mudie, 1 Sim. & St. 282; Colegrove v. Manley, 1 Turn. & R. 400; Mountford v. Scott, 1 Ibid. 274; Heslop v. Metcalf, 3 Mylne & C. 183; Cane v. Martin, 2 Beav. 584.

costs on the papers of the company. Where, in such a case, moneys have been recovered in any of the actions, although the solicitors would have a lien for their costs on such moneys while in their hands, yet after they have paid over such moneys to the company, and allowed them to be incorporated with the general assets, they have no lien on those assets.¹

Where deeds are delivered for the purpose of conducting a suit, the general lien prevails; but where they are delivered for a specific purpose, there can be no lien beyond that purpose.² Where a client executes a deed in favor of his solicitor, reserving a life interest and power of revocation, it is the duty of the latter to leave a counterpart in the hands of his client, and he cannot refuse to produce the deed on the ground of lien.³ The lien does not extend to deeds or papers received merely as steward of a manor and not in the capacity of an attorney.⁴ Nor does it extend to the will of the client.⁵ Nor to papers which he obtains as *prochein ami*.⁶ An attorney may refuse to deliver up papers till his fees are paid.⁷ He may retain moneys belonging to an executor, as such, for work done for the testator.⁸

Where an attorney employed a clerk in some cases, and died insolvent, it was held the clerk in court had a lien on the money in the hands of the clients.⁹ An attorney in possession of a deed to which he is the attesting witness, and claiming a lien thereon, cannot be compelled to produce it; he can only be treated like any other witness, and compelled to attend by *subpoena duces tecum*.¹⁰ But where a wife sued to enforce a settlement, the attorney who prepared it was not allowed to retain it on the ground of his lien against the husband, and was ordered to produce it, and to pay all costs in consequence of refusal.¹¹

¹ In re Phoenix Company, 1 H. & M. 433.

² Ex parte Stirling, 16 Ves. 258; Ex parte Pemberton, 18 Ves. 282.

³ Balch v. Symes, 1 Turn. & R. 87.

⁴ Champernoune v. Scott, 4 Madd. 209.

⁵ Balch v. Symes, 1 Turn. & R. 87; Georges v. Georges, 18 Ves. 294.

⁶ Montague on Lien, 53.

⁷ Anon. Comb. 43, 337; 12 Mod. 516, 554.

⁸ Bishop v. Huggins, 1 Barnes. 31.

⁹ Waldron's Case, 2 Str. 1126. See, also, Stevenson v. Blakelock, 1 Maule & S. 535; Esdaile v. Oxenham, 3 Barn. & C. 225; 5 Dowl. & R. 49; 2 Younge & J. 493.

¹⁰ Busk v. Lewis, 6 Mad. 29.

¹¹ Brassington v. Brassington, 1 Sim. & St. 455.

§ 374. Summary jurisdiction to order delivery of papers, as affecting the attorney's lien.—We have already seen that the court will, under proper circumstances, compel an attorney to deliver papers intrusted to him for perusal.¹ And this, though they concern him and his title, or which were delivered to him by the order of another person; and where he gives a receipt for them, he may be compelled to redeliver them on demand,² especially on payment of all due to him.³ If the writings were delivered for a special purpose, the attorney cannot detain them for another demand, as where they were delivered for the purpose of preparing a mortgage, the attorney has not, as against the mortgagee, a general lien in respect of his demand against the mortgagor.⁴ But the court will not interfere in favor of a third person if the attorney has delivered back the papers to his own client from whom he received them, though they may in fact belong to another.⁵ If an attorney delivers papers to the attorney for the other party, the latter attorney may be compelled to redeliver them.⁶

The general rule is, that an attorney is bound, upon payment of what is due him from a client, to redeliver deeds and papers to the client, and an attachment may be obtained against him if he refuse to deliver them on demand, but not without a demand.⁷ It must be understood, however, that the writings must come to the attorney's possession in the way of his business as an attorney; for if they come to him in any other manner or on any other account than in the way of his business, the party must resort to his action, and the attorney cannot, as in the first-mentioned class of cases, be compelled to produce them on motion or attachment.⁸ Still, it must be acknowledged that the courts have sometimes exercised their summary jurisdiction where the

¹ *Ante*, sec. 93.

² *Tyack's Case*, Skin. 1; 2 Mod. 340; *Strong v. Howard*, Str. 621.

³ *Goring v. Bishop*, 1 Salk. 87.

⁴ *Lawson v. Dickenson*, 8 Mod. 306.

⁵ *Dottin's Case*, Str. 547.

⁶ *Strong v. Howe*, Str. 621.

⁷ *Russell's Case*, Say. 125; *Strong v. How*, 1 Str. 621; *Lawson v. Dickenson*, 8 Mod. 306; 8 Mod. 339; 1 Kenyon, 129; *Barton v. Baynes*, 1 Barnes, 18; *Hamilton v. Incedon*, 4 Brown Parl. C. 4.

⁸ *Goring v. Bishop*, 1 Salk. 87; *Russell's Case*, Say. 125; *Cocks v. Harmon*, 6 East, 404; *Lowe's Case*, 8 East, 237; *Ross v. Laughton*, 1 Ves. & B. 349.

attorney did not receive them, strictly speaking, as an attorney, but as a steward of the court or receiver.¹

The court having jurisdiction to order the delivery of deeds and papers, to do justice between the parties, has also power to compel, as a concurrent act, the discharge of any lien that the attorney may have for his costs; to ascertain the amount of which, taxation may be requisite, and is consequent upon the order of delivery.² If it appear that a third person is interested in the deeds, the court will take a security from the person to whom they are delivered, to produce them on demand, for the benefit of such third party.³ Whenever a client is bound to produce a deed for the benefit of a third person, so also is his attorney, though the latter may have a lien against it, for costs against his client.⁴ An attorney submitting to produce title-deeds of his client, in his possession, as the court shall direct, may be called upon to produce them, though the principal himself could not have been called upon to do so.⁵

A solicitor declining to be further concerned in a cause, is not entitled to compel payment of his costs by refusing to permit such inspection of documents in his possession, or such production of them before the court, as may be necessary to conduct the cause.⁶ The court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor, without payment, or security for the payment of the bill.⁷ But if an attorney assign over his business, the court will order the papers to be delivered to the new attorney, upon signing a receipt for them, and undertaking to hold them subject to the former's lien.⁸ Sometimes the order is made upon a deposit of a sufficient amount to cover the bill and costs of taxation.⁹ An attorney upon receiving the amount of his

¹ *Hughes v. Mayre*, 3 Durn. & E. 275; *Ex parte Grubb*, 5 Taunt. 206; *Ex parte Corpus Christi College*, 6 Taunt. 105. But see *Cocks v. Harmon*, *supra*.

² *Ex parte Partridge*, 2 Mer. 501.

³ *Hughes v. Mayre*, 3 Durn. & E. 275; *Ex parte Uxbridge*, 6 Ves. 425; *Strong v. Howe*, 1 Strange, 621; *Ex parte Smith*, 5 Ves. 700.

⁴ *Furlong v. Howard*, 2 Schoales & L. 115.

⁵ *Fenwick v. Reed*, 1 Mer. 114.

⁶ *Commerell v. Boyston*, Swanst. 1.

⁷ *Bolton v. Tate*, Swanst. 84.

⁸ *Colegrave v. Hanley*, 1 Turn. & R. 401.

⁹ *Clutton v. Pardon*, 1 Turn. & R. 301.

bill, must not only deliver up the originals, but also the drafts and copies.¹

§ 375. Waiver and loss of the lien.—A lien upon deeds, etc., in the attorney's hands, may be waived or lost by setting up an inconsistent claim, by parting with the possession, by bringing an action, or by taking other security for the claim. It is deemed to be waived by his denying the client's title to the deeds,² or setting up his own claim or a third party's,³ or claiming other right of detention aside from the lien.⁴ A simple refusal to deliver without referring to the lien, is not, however, a waiver,⁵ nor is the claiming of more than is actually due.⁶ The lien is usually lost by parting with the possession of the deeds and instruments upon which they attach, especially if they are improperly parted with,⁷ but not if they are improperly wrested from the attorney's possession by others, through fraud and deceit, and without collusion on the part of the attorney,⁸ or given to the client for a temporary purpose, without prejudice to the lien.⁹ The lien is also lost by bringing an action and obtaining judgment for the amount of the attorney's claim,¹⁰ or by an implied satisfaction of the lien on the part of the attorney.¹¹ The lien may also be waived by taking a security for the debt which forms the subject of the lien. At least if the security be of a higher nature, as a bond, it would seem to be entirely lost; and so, if the security be payable at a future day;¹² and during the time the instrument has to run, the client is entitled

¹ *Ex parte Horsfall*, 7 Barn. & C. 528. See further, *Davidson v. Napier*, 1 Sim. 247; *Alger v. Hefford*, 1 Taunt. 38; *Ex parte Titley*, 2 Rose, 83; *Duncan v. Richmond*, 1 Moore, 99; *Pearson v. Sutton*, 5 Taunt. 364; *Court v. Gilbert*, 2 Barn. 263; *Ross v. Laughton*, 1 Ves. & B. 349.

² *Boardman v. Sill*, 1 Camp. 310.

³ *Knight v. Harrison*, and *Scarfe v. Morgan*, 4 Mees. & W. 270.

⁴ *Dirks v. Richards*, 5 Scott, N. R. 534.

⁵ *White v. Gainer*, 2 Bing. 23; *Owen v. Knight*, 4 Bing. N. C. 54.

⁶ *Scarfe v. Morgan*, 4 Mees. & W. 270. See *Jones v. Tarleton*, 9 Mees. & W. 675.

⁷ *Clark v. Gilbert*, 2 Bing. N. C. 353; *Scott v. Newington*, 1 Macl. & R. 252; *Jones v. Cliffe*, 3 Tyrw. 577.

⁸ *Dicas v. Stokely*, 7 Car. & P. 587.

⁹ *Blunden v. Desart*, 2 Dru. & War. 405. See *Jones v. Pearte*, 1 Strange, 556; *Hartley v. Hitchcock*, 1 Starkie's *Nisi Prius* Reports, 201; 8 Taunt. 149.

¹⁰ *Ex parte Salomon*, 1 Glyn. & J. 25.

¹¹ *Cooper v. Harrison*, 2 Younge & C. 514; *Coopwood v. Wallace*, 12 Ala. 790.

¹² *Hewison v. Guthrie*, 2 Bing. N. C.; *Balch v. Symes*, 1 Turn. & R. 87.

to the possession of the papers ;¹ but perhaps, if the client does not exercise this right, the attorney, on the failure of the security, may be entitled to his original lien, yet it is not altogether certain.²

§ 376. When the lien is superseded.—If an attorney refuse to proceed with his client's cause, his lien is superseded, and he must allow the new attorney to see papers detained in his possession until his bill is settled, at all reasonable times, and he must himself attend with them in court, or suffer the new attorney to have them for that purpose.³ If the solicitor take a security for the amount of his bill, his lien will be superseded.⁴

Agents of attorneys have liens on papers in their hands for amounts due them as agents in the cause, but they are not entitled as against the client to a general lien, but only for their agency in the particular cause.⁵

§ 377. Collusive settlements.—If the defendant's attorney pay over to the plaintiff the debt and costs recovered after notice from the plaintiff's attorney not to do so till his bill has been satisfied, the former is liable to pay over again to the latter the amount due for costs.⁶ If a plaintiff compromise the debt and costs with the defendant, before the plaintiff's attorney has been paid, the court will not oblige the defendant to pay him unless he gave notice to the defendant not to settle until his bill should be paid.⁷ A plaintiff may, without consulting with his attorney, compromise an action with the defendant, and take on himself the payment of the costs to the attorney, provided there be no fraudulent conspiracy to cheat the attorney of his costs.⁸ If the parties collusively settle the debt and costs upon an execution in order to defraud the plaintiff's attorney of his costs, the latter

¹ *Cowell v. Simpson*, 16 Ves. 275.

² *Stevenson v. Blakelock*, 1 Maule & S. 534; *Oxenham v. Esdaille*, 3 Barn. & C. 225; 2 *Younge & J.* 493; *Balch v. Symes*, 1 Turn. & R. 87.

³ *Commerell v. Poynton*, 1 Swanst. 1; *Creswell v. Byron*, 14 Ves. 271; *Ross v. Langhton*, 1 Ves. 349; *Merryweather v. Mellish*, 13 Ves. 161.

⁴ *Cowell v. Simpson*, 16 Ves. 275; *Gray v. Cockerel*, 2 Atk. 144, 307; 3 Atk. 727.

⁵ *Ward v. Hepple*, 15 Ves. 297; 16 Ves. 164.

⁶ *Reed v. Dupper*, 6 Durn. & E. 361.

⁷ *Welsh v. Hole*, 1 Doug. 238.

⁸ *Chapman v. Haw*, 1 Taunt. 341.

cannot sue a second execution on the same judgment to obtain his costs, but must apply to the court.¹

Whenever there is an attempt on the part of the client to make a settlement behind the attorney's back, the attorney's lien will be protected where the party making the settlement agrees to pay the costs of the adversary's attorney;² and so whenever the settlement is made collusively by the parties in the absence of the attorney, with an evident design to defraud him of his costs, whether the action sound in tort, or is upon a contract.³ And where the claim is assigned to a third person in fraud of the attorney's rights.⁴

But where an attorney, without a regular authority from the plaintiff, commenced an action of *replevin*, but the plaintiff with a knowledge of the proceedings suffered the cause to be carried to trial, but afterward, concerting with defendant, entered up satisfaction on the record without securing to the attorney his costs, the court refused to vacate the entry of satisfaction.⁵ Where there was a bill of discovery in aid of a defense at law, and an injunction was obtained on terms of paying the money into court, and the defendant afterward succeeded at law, it was held that a solicitor in equity had a lien on the fund for the costs of the discovery; but a great part of the business appearing to have been done by another solicitor, and his demand satisfied, the court refused to extend the lien of the first solicitor beyond the costs actually incurred by him.⁶

§ 378. Remedies on the lien.—It seems, in England, that the solicitor cannot actively enforce his lien on papers. He can only hold them, and if the client does not need them the lien appears to be of little practical utility.⁷ But where he has expended costs, and the client discharges him, his lien extends to

¹ *Graves v. Eades*, 1 Marsh. 113; 5 Taunt. 429. See *Swain v. Senate*, 2 New Rep. 99; *Toms v. Powell*, 6 Esp. 40; *Charlwood v. Berridge*, 1 Esp. 345.

² *Hall v. Ayer*, 9 Abb. Pr. 220.

³ *McKenzie v. Rhodes*, 13 Abb. Pr. 337; *Rasquin v. Knickerbocker Stage Co.*, 21 How. Pr. 293; *Richardson v. Brooklyn City*, 24 Ibid. 321; *Fox v. Fox*, 24 Ibid. 409.

⁴ *Cregier v. Cheesebrough*, 25 How. Pr. 200.

⁵ *Abbott v. Rice*, 3 Bing. 132.

⁶ *Irving v. Viana*, 2 Younge & J. 70.

⁷ *Bozon v. Bolland*, 4 Myl. & C. 354.

refusing the use of the papers to the client or his next solicitor;¹ but it is otherwise if he withdraws himself, because then he is bound to give the client the use of the papers, though his lien, useless as it is, theoretically continues.² The rule is thus laid down:³ "If a client discharges his solicitor, the court does not take the papers from the latter, unless upon payment of his bill. If, on the other hand, the solicitor discharges himself, then, according to the decision in *Heslop v. Metcalfe*,⁴ the court will compel him to give over the papers to the new solicitor, saving his lien upon them. There was a doubt, before that case, whether the rule was to allow a new solicitor, on behalf of his client, to inspect papers in the hands of the old solicitor, and take copies of them, or whether the papers were to be delivered over. Lord Cottenham, in that case, made an observation, the force of which we must feel, that 'the only effect of obliging the new solicitor to take copies is to put the client to expense, without any benefit to the old solicitor, for when the copies are taken nothing more is wanted. The case of papers in a cause is different from that of deeds, which have an intrinsic nature that cannot be imparted to copies.'"

It is said that in an action of trover a plea of not guilty does not enable the defendant to give evidence of a lien.⁵ But in trover, where the plaintiff must have a right of property and a right to the immediate possession, a plea of "not possessed" has been held a proper plea to let in this defense, a right of lien being a right to refuse possession.⁶

§ 379. Equitable interference to protect the lien.—If the client settles the case so as to deprive the attorney of his costs, it is clear that the latter has redress against the former; and if the attorney notify the opposite party that he has an unsatisfied claim, he can recover from such party the amount of

¹ *Lord v. Wormelighton*, Jac. 580; *Bozon v. Bolland*, *supra*; *Newton v. Harland*, 4 Scott N. S. 769.

² *Heslop v. Metcalfe*, 3 Mylne & C. 159; *Colegrave v. Manley*, 3 Ibid. 183; *Creswell v. Byron*, 14 Ves. 271. In case of death of client, see *Ross v. Laughton*, 1 Ves. & B. 349.

³ *Griffiths v. Griffiths*, 2 Hare, 590.

⁴ 3 Mylne & C. 183.

⁵ *White v. Teal*, 12 Ad. & E. 106.

⁶ *Owen v. Knight*, 4 Bing. N. C. 54.

his claim, where the settlement was collusive.¹ He has, however, no such right if he give no such notice.² But the right exists, though the notice be informal and constructive.³

Where the judgment is for costs, the record is sufficient notice to all parties;⁴ but an application on the part of the attorney to vacate satisfaction of judgment should be promptly made.⁵ While the courts reluctantly interfere, at the instance of attorneys, to prevent parties amicably adjusting an action, the parties will be prevented from defeating the attorney's claim for the costs of the action by private arrangements between themselves.⁶ When the collusive settlement is of record, the attorney may move to set it aside, or if the settlement be before judgment, it is said that he may treat it as a nullity and proceed with the suit.⁷ But it must clearly appear that it is collusive.⁸

¹ Wharton on Agency, sec. 627; *Welsh v. Hole*, 1 Doug. 237; *Barker v. St. Quintin*, 12 Mees. & W. 440; *Nelson v. Wilson*, 6 Bing. 568; *Hart v. Chapman*, 2 Aik. 162; *Foot v. Tewksbury*, 2 Vt. 97; *Quimby v. Quimby*, 6 N. H. 79; *Currier v. R. R.* 37 N. H. 223; *Martin v. Hawks*, 15 T. R. 405; *Power v. Kent*, 1 Cow. 172; *Haight v. Holcomb*, 16 How. Pr. 160, 173; *Sherwood v. R. R.* 12 How. Pr. 136; *Dietz v. McCallum*, 44 Ibid. 493; *Rooney v. R. R.* 18 N. Y. 368; *McGregor v. Comstock*, 28 N. Y. 237; *McKenzie v. Wardwell*, 61 Me. 136; *Hunt v. McClanahan*, 1 Heisk. 503; *Pleasants v. Kontrecht*, 5 Heisk. 694.

² *Chapman v. How*, 1 Taunt. 341; *Graves v. Eades*, 5 Taunt. 429; *Matt v. Smith*, 4 Barn. & Ald. 466; *Walsh v. Hole*, 1 Doug. 238; *Barker v. St. Quintin*, 12 Mees. & W. 440; *Hough v. Edwards*, 1 Hurl. & N. 171; *Hawkins v. Loyless*, 39 Ga. 5; *Green v. Exp. Co.*, 39 Ga. 20; *Pinder v. Morris*, 3 Caines, 165; *People v. Hardenburgh*, 8 T. R. 335; *McDowell v. R. R.* 4 Bosw. 670.

³ *Abell v. Potts*, 3 Esp. 242; *Young v. Dearborn*, 7 Fost. 324; *Lake v. Ingham*, 3 Vt. 158; *Reed v. Dupper*, 6 Term Rep. 361; *Cole v. Bennett*, 6 Price, 15.

⁴ *Welsh v. Hole*, 1 Doug. 238; *Wright v. Cobleigh*, 1 Fost. 339; *Read v. Dupper*, 6 T. R. 361; *McGregor v. Comstock*, 28 N. Y. 237; *Haight v. Holcomb*, 16 How. Pr. 173; *Leshner v. Roessner*, 3 Hun, 217; *Sherwood v. R. R.* 12 How. Pr. 136.

⁵ *Quimby v. Quimby*, 6 N. H. 79.

⁶ *Moore v. Angell*, 11 Jur. 485. See *Ex parte Hart*, 1 Barn. & Ad. 666; 1 Dowl. 324; *Quested v. Callis*, 10 Mees. & W. 18; 1 Dowl. N. S. 888; 11 Law J. N. S. Ex. 345; *Clark v. Smith*, 1 Dowl. & L. 960; 6 M. & G. 1051; 13 Law J. N. S. C. P. 97. By the 23 and 24 Vict., chap. 127, sec. 28, "All conveyances and acts operating to defeat" such charge shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void against such charge.

⁷ *Jones v. Bonner*, 2 Ex. 229; *Rooney v. R. R.* 18 N. Y. 368; *Talcott v. Bronson*, 4 Paige, 501; *Swain v. Senate*, 5 Bos. & P. 99. As to *bona fide* settlements before judgment and without notice, see *Simmons v. Almy*, 103 Mass. 33.

⁸ *Jones v. Bonner*, 2 Ex. 229; *Waight v. Burrows*, 3 Com. B. 343; *Francis v. Webb*, 7 Com. B. 731; *Jordan v. Hunt*, 3 Dowl. P. C. 666; *Nelson v. Wilson*, 6 Bing. 568; *Clark v. Smith*, 1 Dowl. & L. 960; *Henchy v. Chicago*, 41 Ill. 136; *Sullivan v. Pearson*, 19 L. T. N. S. 430; L. R. 4 Q. B. 153; 9 Best & Smith, 960. See,

§ 380. Right of set-off as affecting the lien.—The right of set-off may prevail so as to interfere with a solicitor's lien upon the debt recovered; but where other claims, arising out of different transactions, and which could not have been a legal or equitable set-off in that suit, exist between the parties, the court will not divest the lien of the solicitor, which has already attached on the amount recovered, for the costs of that particular litigation.¹

A verdict in favor of a plaintiff having been given, a rule *nisi* was obtained by the defendant for a new trial. On the hearing, the court, by consent, ordered that the cause, and another cause between the same parties in a county court, should be referred to an arbitrator, the costs of each cause to abide the event, the costs of the reference and of the award to be in the discretion of the arbitrator. The arbitrator made his award in the cause in favor of the defendant, and in the cause in the county court in favor of the plaintiff, with damages, and gave the plaintiff the costs of the reference, and divided the costs of the award between the parties. The plaintiff took up the award. The court held, on a rule to set off against the money and costs payable to the plaintiff the costs of the cause, and the rule to which the defendant was entitled, that the defendant, not being entitled to such costs under the award, could not set off the several costs to the prejudice of the attorney's lien.²

Yet, on the other hand, it has been held in an action of trespass, where a verdict was found against one defendant, but in favor of another, that the costs might be set off, notwithstanding the effect of it was to deprive the attorney of his lien.³ And so a successful defendant's costs have been set off against the plaintiff's, without regard to the lien of the plaintiff's attorney, where it was shown that the latter was the real party in inter-

as to suits for unliquidated damages, *Torrey v. Payne*, 1 Barn. & Adol. 660; *Hutchinson v. Pettis*, 18 Vt. 614; *People v. Tioga C. P.* 19 Wend. 73.

¹ *Carter v. Bennett*, 6 Fla. 214; *Calvert v. Coxe*, 1 Gill, 95.

It is said that the right of setting off one judgment against another is not a legal right, but is given by the equitable jurisdiction of a court with reference to all the circumstances of the transaction, and will not be allowed so as to defeat either the attorney's lien for costs or the right acquired by an assignee. (*Simpson v. Lamb*, 7 El. & B. 84; 3 Jur. N. S. 412; 20 Law J. Q. B. 121.)

² *Little v. Philpotts*, 8 Jur. N. S. 1175; 31 Law J. Q. B. 125.

³ *George v. Elston*, 1 Scott, 518; 1 Hodges, 63.

est.¹ In another case the court made absolute without costs a rule for setting off the costs of a successful defendant against the damages and costs awarded for the plaintiff against the other defendant, disregarding the attorney's lien.² Interlocutory costs have been set off against final costs in the same cause without reference to the lien, and where one judgment is set off against another the lien does not extend beyond costs in the particular cause.³

An attorney who obtains a judgment has a lien upon it for the amount of his costs.⁴ And if the judgment be solely for costs, the record is notice to the judgment-debtor of the attorney's rights, and payment to the party, being in fraud of the attorney, is no defense.⁵ If, after the verdict of a jury or the report of a referee in an action of tort, the successful party assign to his attorney the verdict or report, and the judgment to be entered thereon in payment for his services, such an assignment is valid, and will be upheld.⁶ One judgment will not be set off against another while an appeal is pending, and on a motion to set off one judgment against another the court will protect the lien of the attorney.⁷ But in an action to compel a set-off, the legal right overrides an equitable lien where there is no assignment to the attorney before judgment, or no agreement that the attorney shall have the costs as a recompense for his services.⁸ Such an agreement before recovery of judgment being valid and binding,⁹ the lien covers any sum which it is agreed the attorney shall receive out of the recovery beyond the costs.¹⁰

The set-off by the opposite party, if protected by statute, is superior to the charging lien.¹¹ Such appeared to be the weight

¹ *Pocock v. O'Shannessy*, 6 Ad. & E. 807.

² *Rawlings v. Sewell*, 7 Scott, 231.

³ *Ibid.*; *Halliday v. Lawes*, 4 Scott, 475; 3 Hodges, 130.

⁴ *McGregor v. Comstock*, 28 N. Y. 237.

⁵ *Ibid.*

⁶ *Roberts v. Carter*, 38 N. Y. 107; *Mackey v. Mackey*, 43 Barb. 58.

⁷ *De Figanieri v. Young*, 2 Robt. 671; *Purchase v. Bellows*, 16 Abb. Pr. 105.

⁸ *De Figanieri v. Young*, 2 Robt. 670; *Martin v. Kanhouse*, 17 How. Pr. 146; *Nicholl v. Nicholl*, 16 Wend. 445; *Robbins v. Alexander*, 11 How. Pr. 100. See *Mercer v. Graves*, Law R. 7 Q. B. 499; S. C. 2 Moak. Eng. R. 618.

⁹ *Ely v. Cooke*, 28 N. Y. 365.

¹⁰ *Rooney v. Second Avenue*, 18 N. Y. 368; *Fitch v. Gardinier*, 2 Keyes, 516; *Benedict v. Stuart*, 23 Barb. 420; *Fogerty v. Jordan*, 2 Robt. 325.

¹¹ *Vaughn v. Davies*, 2 H. Black. 440; *Bawtree v. Watson*, 3 Myles & Cr. 713. See *Mitchell v. Oldfield*, 4 T. R. 124; *Moreland v. Pasley*, 2 H. Black. 441; *Ran-*

of authority in England, though subsequently, by rules of several of the courts of common law, no set-off between the parties to the suit can prejudice the attorney's claim to costs in such suit. But where a statute provides that a set-off shall extinguish a debt, then, when the debt is thus extinguished, there is nothing on which the attorney's lien can act.¹

In England, parties have been allowed to deduct or set off the costs or debt and costs in one action against those in another. The right of set-off has been sometimes subject to the lien of the attorney for his bill of costs, and the defendant has not been allowed to set off his debt and costs in one action against those in another, until the attorney's bill for business done in the cause wherein he was concerned be first discharged. In other cases, the lien is held to be subject to the equitable claims that exist between the parties to the cause. And the Court of Chancery will not interpose the lien further than upon the clear balance which is the result of the equity between the parties.²

§ 381. Appropriation of payments on account.—An attorney who has several demands against his client, some of

dle v. Fuller, 6 T. R. 456; *Glaister v. Heaver*, 8 T. R. 70; *Middleton v. Hill*, 1 Mylne & S. 240; 1 Dowl. & R. 168.

¹ 2 Kent's Com. 641; *Walker v. Sargeant*, 14 Vt. 247; *Porter v. Lane*, 8 Johns. 357; *Mohawk Bank v. Burrows*, 6 Johns. Ch. 317; *Nicoll v. Nicoll*, 16 Wend. 446; *Benjamin v. Benjamin*, 17 Conn. 110; *Firmirick v. Bovee*, 4 Thomp. & C. 98; *Tillman v. Reynolds*, 48 Ala. 365; *Neil v. Staten*, 7 Heisk. 290; *Mitchell v. Milhoan*, 11 Kans. 617.

² *Taylor v. Popham*, 15 Ves. 75; 2 New Rep. 102; *Tidd's Pr.* 991, 339, 40, 9912. See, also, *Randall v. Fuller*, 6 Durn. & E. 456; *Glaister v. Hower*, 8 Ibid. 69; *Middleton v. Hill*, 1 Maule & S. 240; *Aspinwall v. Stamp*, 4 Dowl. & R. 716; 3 Barn. & C. 108; *Harrison v. Bainbridge*, 4 Dowl. & R. 363; 2 Barn. & C. 800; *Nunez v. Modigliani*, 1 H. Black. 217; *Hall v. Ody*, 2 Bos. & P. 28; *Mitchell v. Oldfield*, 4 Durn. & E. 123; *Van Sandau v. Burt*, 1 Dowl. & R. 168; *Stevens v. Weston*, 5 Dowl. & R. 399; 3 Barn. & C. 535; *Howell v. Harding*, 8 East, 362; *Smith v. Brocklesbury*, 1 Anst. 61; *Gobbitt v. Chaytor*, 1 Anst. 279; *Murphy v. Cunningham*, 1 Anst. 271; *Gifford v. Gifford*, *Forrest*, 109; *Emdin v. Darlin*, 1 New Rep. 22; *Schoole v. Noble*, 1 H. Black. 23; *Brown v. Sayce*, 4 Taunt. 320; *Lomas v. Mellor*, 5 Moore, 95.

In Kentucky, the lien of the attorney attaches at the commencement of the suit, and cannot be affected by subsequently acquired set-offs. (*Stephens v. Farrar*, 4 Bush, 13; *Robertson v. Shutt*, 9 Bush, 660. See generally, as to the charging lien, *Wylie v. Cox*, 15 How. 415; *In re Paschal*, 10 Wall. 483; *Patten v. Wilson*, 34 Pa. 299. The following cases deny the charging lien for fees: *Forsythe v. Beveridge*, 52 Ill. 268; *Ex parte Syle*, 1 Cal. 331; *Mansfield v. Dorland*, 2 Cal. 331. The following cases deny the right of set-off: *Stratton v. Hussey*, 62 Me. 288; *Currier v. R. R.* 37 N. H. 223; *Johnson v. Ballard*, 44 Ind. 270; *Boyer v. Clark*, 3 Neb. 161; *Carter v. Davis*, 8 Fla. 183.)

which are barred by the Statute of Limitations, has no right to appropriate, in payment of the demands so barred, a sum received by him on account of his client, for damages recovered in an action.¹ And so it is held that where directors of a company carry on business unauthorized by the deed of settlement, and moneys have been paid by the company to the solicitors on account of costs generally, the solicitors have no right *post litem motam* to appropriate such payments to the costs incurred in respect of the unauthorized business, but, on the contrary, the court will appropriate the payments to the costs which the company was liable to pay.²

§ 382. Settlements between the parties as affecting the lien.—Provided there is no fraudulent conspiracy to cheat the attorney out of his costs, a plaintiff may, without consulting his attorney, compromise an action with a defendant, and take upon himself the payment of the costs to the attorney.³ The attorney of the defendant has no such interest in the suit as to prevent the parties from compromising it without his consent.⁴ And if a plaintiff compromises the debt and costs with the defendant before the plaintiff's attorney has been paid, the court will not oblige the defendant to pay him unless he gave notice to the defendant not to settle with the plaintiff till his bill should be paid.⁵ But if the defendant's attorney pays to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so till his bill has been first satisfied, the former may be liable to pay over again to the latter the amount of his lien on the debt.⁶ It is said that where the damages sought to be recovered in an action are unliquidated, the parties may compromise without regard to the plaintiff's attorney's claim to costs.⁷ Where a plaintiff and defendant collude in the settlement of an action, in order to deprive the plaintiff's attorney of his costs, and a bill for debt and costs is given by the defendant in fur-

¹ Waller v. Lacey, 1 Man. & G. 54; 1 Scott N. R. 186.

² Phoenix Life Insurance Co., In re, 1 H. & M. 433.

³ Chapman v. Hare, 1 Taunt. 341; Jordan v. Hunt, 1 Gale, 159; Nelson v. Wilson, 4 Moore & P. 385; 6 Bing. 568.

⁴ Quested v. Callis, 10 Mees. & W. 18; 6 Jur. 512.

⁵ Welsh v. Hole, 1 Doug. 238.

⁶ Read v. Duppa, 6 Term Rep. 361.

⁷ Ex parte Hart, 1 Barn. & Ad. 660.

therance of that collusion, the court will compel the delivery up of that bill.¹ Where there are cross-actions, and the plaintiff in each has obtained judgment, it is competent for the parties to come to a *bona fide* settlement of the matter between themselves, although the consequence of such settlement may be, that the attorney for one party will lose his lien for his costs. But if such settlement is come to by collusion and fraud, for the purpose of depriving the attorney of his costs, he has a right to call for the interference of the court.² A plaintiff who had obtained judgment for his costs, in collusion with the defendant, in order to defeat the lien of the plaintiff's attorney, gave him and the sheriff notice not to execute any process on pain of being treated as trespassers. It was held that a judge had power, in the exercise of the equitable interference of the court, to order that the plaintiff "or the defendant" pay the attorney the costs.³ It is said that even where a pauper plaintiff settles the action behind the back of his attorney, it is entirely a question for the discretion of the court, under the particular circumstances of the transaction, whether they will interfere and set aside the proceedings.⁴ And the court will not interfere, even in the case of a plaintiff suing *in forma pauperis*, to prevent effect being given to a settlement between the parties, although it be evident that the attorney will lose his costs, unless the settlement is clearly collusive or fraudulent.⁵

§ 383. Liens for partnership debts, etc.—An attorney with whom title-deeds, the property of a member of a firm, have been deposited by that member, in the course of professional business done on his private account, has no lien on them for a debt due from the partnership.⁶ Nor does an attorney acquire a lien for costs due to himself solely, upon documents which

¹ Gould v. Davis, 1 Crompt. & J. 415; 1 Tyrw. 380.

² Brunson v. Allard, 2 El. & E. 19; 5 Jur. N. S. 596; 28 Law J. Q. B. 306; 7 Week. R. 581; 33 Law T. 220.

³ Ex parte Games, 3 Hurl. & C. 294.

⁴ Jones v. Bonner, 2 Ex. 230; 5 Dowl. & L. 718; 17 Law J. Ex. 343.

⁵ Francis v. Webb, 7 C. B. 731; S. P., Moore v. Angell, 11 Jur. 455. A release of all demands from the plaintiff to the defendant will not deprive the plaintiff's attorney of his lien upon the costs of an action awarded in favor of the plaintiff. (Gifford v. Gifford, Forrest, 109; Ormerod v. Tate, 1 East, 404.)

⁶ Turner v. Deane, 6 Dowl. & L. 669; 3 Ex. 836; 18 Law J. Ex. 343; In re Forshaw, 16 Sim. 121.

came into the joint possession of himself and his partner or partners, but he does not lose his lien for such costs upon documents which, having come into his own possession, are afterward continued in the possession of himself and his partners.¹

§ 384. Lien on sums awarded and on judgment money.

—An attorney has a lien upon a sum awarded in favor of his client, as well as if recovered by judgment; and if, after notice to the defendant, the latter pays it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself.² A builder, and an uncertificated bankrupt, sued for a balance due to him for repairs, and was nonsuited; the cause was referred, and the arbitrator found a sum due to the plaintiff. The court held that his attorney had a claim, as against the assignees, to the amount of his lien on the award, for the costs of the action and of the award.³

An attorney has a lien for his bill of costs on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party against whom the execution issued, to retain the money in his hands.⁴ But where a defendant is entitled against a plaintiff to be released from a verdict obtained against him, the court will not abstain from interfering, on the ground of the lien of the plaintiff's attorney upon the verdict for his costs.⁵

¹ *Pelly v. Wathen*, 7 Hare, 351; 14 Jur. 9; 18 Law J. Ch. 281.

² *Ormerod v. Tate*, 1 East, 464; *S. P. Cowell v. Betteley*, 4 Moore & S. 265; 10 Bing. 432.

³ *Jones v. Turnbull*, 2 Mees. & W. 601; M. & H. 106; 1 Jur. 638.

⁴ *Griffin v. Eyles*, 1 H. Black. 122.

⁵ *Symons v. Blake*, 2 Crompt. M. & R. 416; 1 Gale, 182.

TABLE OF CASES.

TABLE OF CASES.

A.

- Abbe v. Rood*, 6 McLean, 106, pp. 397, 399, 411.
Abbey v. Petch, 1 Younge & C. Ch. 258, pp. 445, 457, 468.
Abell v. Potts, 3 Esp. 242, p. 625.
Abbott v. Dutton, 44 Vt. 546, pp. 328, 343.
 v. Rice, 3 Bing. 132; 2 Paige, 276, pp. 368, 609, 623.
 v. Zeigler, 9 Ind. 511, p. 218.
Ackerman v. Ackerman, 14 Abb. Pr. 229, p. 606.
Adams v. Bank, 23 How. Pr. 45, pp. 425, 426.
 v. Claxton, 6 Ves. 226, p. 456.
 v. Bank, 36 N. Y. 255, p. 579.
 v. Fort Plain Bank, 23 How. Pr. 58, p. 415.
 v. Fox, 40 Barb. 442, p. 457.
 v. Hopkins, 5 Johns. 252, p. 234.
 v. Malkin, 3 Camp. 540, p. 44.
 v. Robinson, 1 Rich. 462, pp. 375, 378.
 v. Roller, 35 Tex. 711, p. 397.
 v. Stevens, 26 Wend. 452, p. 552.
 v. Woods, 8 Cal. 306, p. 569.
Adamson v. Evitt, 2 Russ. & M. 66, p. 455.
Addington v. Appleton, 2 Camp. 410, pp. 135, 178.
Aikin v. Kilburne, 27 Me. 252, p. 266.
Ailway v. Burrows, Doug. 363, p. 203.
Aitkin, In re, 4 Barn. & Ald. 47, pp. 133, 134, 138, 174.
Albany Bank v. Schemerhorn, 9 Paige, 372, p. 135.
Aldis v. Gardner, 1 Car. & K. 564, pp. 505, 570.
Aldrich v. Brown, 103 Mass. 527, p. 554.
 v. Kenney, 4 Conn. 380, p. 356.
Alexander v. Anderson, 6 Beav. 405, p. 135.
 v. Carpenter, 3 Denio, 266, p. 233.
Aleyer v. Sexton, 2 Stark. 274, p. 299.
Alger v. Hefford, 1 Taunt. 38, pp. 431, 621.
Allaire v. Ouland, 2 Johns. Cas. 52, p. 202.
Allaway v. Duncan, 12 L. T. N. S. 264, p. 240.
Allicorn v. Butler, 9 Tex. 56, p. 600.
Alleley v. Colley, Cro. Jac. 695, pp. 337, 363, 368.
Allen, Adams & Co. v. Harrison, 30 Vt. 219, p. 285.
Allen v. Clark, 1 N. R. 358, pp. 483, 492, 508, 518, 520, 528.
 v. Green, 1 Bail. 448, pp. 345, 352.
 v. Harmon, 30 Vt. 219, p. 318.
 v. McCalla, 25 Iowa, 464, p. 407.
 v. Murphy, 9 Ir. L. R. 305, p. 539.
 v. Rayden, 43 Law J. C. P. 206, p. 289.
 v. Stone, 10 Barb. 547, p. 364.
Allis v. Day, 14 Minn. 516, p. 228.
Allison v. Rayner, 7 Barn. & C. 441, pp. 494, 504.
Alton v. Gilmanton, 2 N. H. 249, pp. 376, 381, 390, 509, 520.
Alspaugh v. Jones, 64 N. C. 29, pp. 358, 376, 403.
Alwood v. Mansfield, 59 Ill. 496, pp. 457, 468.
Ambrose v. McDonald, S. C. Cal. Apl. '78, p. 397.
 v. Rose, Skin. 217; 2 Show. 421, pp. 559, 560, 562, 563.
American Ins. Co. v. Oakly, 9 Paige, 496, pp. 178, 335.
Ames v. Gilman, 10 Met. 239, p. 549.
 v. Webbers, 10 Wend. 576; S. C. 11 Wend. 186, pp. 387, 406.
Amey v. Long, 9 East, 473, p. 293.
Amory v. Hamilton, 17 Mass. 109, p. 419.
Anan v. Stout, 42 Pa. 114, p. 457.
Anderson's Case, 1 Lev. 249, p. 197.
Anderson v. Boynton, 1 D. & L. 25; 13 Q. B. 308; 14 Jur. 14; 19 Law J. Q. B. 42, pp. 331, 543.
Anderson v. May, 2 Bos. & P. 237; 3 Esp. 167, pp. 544, 563.
 v. Passman, 7 Car. & P. 193, pp. 172, 193.
 v. Radcliffe, El. B. & E. 805-817, p. 579.
 v. Rome, 54 N. Y. 335, p. 406.
 v. Sutton, 2 Duval, 480, pp. 343, 351.
 v. Watson, 3 Car. & P. 214, pp. 237, 368.
Andrew, In re, 7 Hurl. & N. 87; 30 Law J. Ex. 403, pp. 171, 539.
Andrew v. Hawley, 23 Law J. Ex. 323, pp. 518, 523.

- Andrew v. Hawley*, 26 Law J. Ex. 323, p. 241.
Andrews v. Morse, 12 Conn. 444, p. 610.
 v. Solomon, 1 Peters C. C. 356, pp. 291, 517.
Annesley v. Anglesea, 17 How. St. Tr. 1139, pp. 253, 284, 292, 308, 319.
Anon. 5 Barn. & Ald. 1088, p. 154.
 22 Wend. 656, pp. 140, 152.
 1 Wend. 108, p. 50.
 9 W. R. 639, p. 87.
 v. Sexton, 1 Dowl. 180, p. 82.
 1 Chit. 129; 2 Id. 36, p. 139.
Appleton v. Binks, 5 East, 148, p. 235.
Arden v. Patterson, 5 Johns. Ch. 44, pp. 459, 465, 587.
 v. Tucker, 4 Barn. & Adol. 815, p. 506.
Ardin v. Tucker, 1 Moody & R. 191; S. C. 5 Car. & P. 258, pp. 557, 560.
Armington's Case, Palmer. 403, p. 197.
Armstrong v. Craig, 18 Barb. 387, p. 493.
 v. Jordan, 2 Stark. Ev. 107, p. 244.
 v. King, 8 Dowl. O. S. 297, p. 432.
 v. Smith, 3 Blackf. 251, p. 513.
Arnold v. Mayor, 5 Scott N. S. 741; 4 Man. & G. 860; S. C. 12 Law J. N. S. C. B. 97; 2 Dowl. N. S. 574, p. 329.
Arnold v. Poole, 5 Scott N. R. 741; 2 D. N. S. 574; 4 M. & S. 860; 7 Jur. 653; 12 Law J. Com. P. 97, p. 334.
Arnold v. Robertson, 3 Daly, 298, p. 517.
Arnott v. Webb, 1 Dill. 362, pp. 353, 381.
Arrington v. Sneed, 18 Tex. 135, pp. 430, 557, 571.
Ash v. Parkinson, 5 Nev. 15, p. 289.
Ashbourne v. Price, D. & R. N. P. C. 48, p. 393.
Ashford v. Price, 3 Stark. N. P. C. 185, pp. 570, 589.
Ashley v. Brown, 1 Lown M. & P. 545; 15 Jur. 399; 19 Law J. Q. B. 477, p. 438.
Aspinwall, In re, 7 Ben. 433, p. 269.
Aspinwall v. Stamp, 4 Dowl. & R. 716; 3 Barn. & C. 108, p. 628.
Atcheson v. Madock, Peake, 163, pp. 471, 493, 501.
Atkins v. —, 1 Chit. 63, p. 203.
Atkinson v. Atkinson, 2 Adams, 469, p. 287.
 v. Mackreth, 2 Law R. Eq. 570, p. 524.
Attorney's License, 1 Zab. 345, p. 153.
Aubrey v. Popkins, Dick. 403, p. 547.
Austin's Case, 5 Rawle, 191, pp. 81, 146, 153.
Austin v. Chambers, 6 Clark & F. 1, p. 456.
Austin v. Nelson, 11 Mo. 192, p. 485.
 v. Vesey, Cary, 89, p. 253.
Averill v. Williams, 4 Denio, 295, p. 414.
Avery v. Long, 9 East, 481, p. 320.
 v. Roe, 6 Dowl. 528; 3 Barb. Ch. 528, p. 298.
Ayrault v. Chamberlain, 26 Barb. 83, p. 506.
Ayre v. Craven, 2 Ad. & E. 2, p. 245.

B.

- Babcock v. Brown*, 25 Vt. 558, p. 485.
Baber v. Harris, 2 W. W. & H. 53, p. 377.
 v. Harris, 7 D. P. C. 589, p. 173.
Backus v. Byson, 4 Mich. 535, pp. 587, 590.
Bach v. Ballard, 13 La. An. 487, p. 426.
 v. Ballard, 19 La. An. 487, p. 437.
Bacon v. Hart, 1 Black. 38, p. 439.
 v. Wayne Co., 1 Mich. 461, p. 324.
Bacon's Case, 1 La. 146, p. 325.
Bailey v. Birchall, 2 Hem. & M. 371; 11 Jur. N. S. 57, p. 612.
 v. Buckland, 5 Dowl. & L. 115, p. 139.
 v. Jones, 1 Chit. 744, pp. 156, 174.
Baillie's Case, 21 How. St. Tr. pp. 341, 358, 408, 315.
Baird v. Ratcliff, 10 Tex. 81, p. 548.
 v. Ratcliff, 10 Cal. 640, p. 570.
Baker v. Arnold, 1 Caines, 258, pp. 307, 301.
 v. Black, 8 Law J. Ex. 393, p. 418.
 v. Commonwealth, 10 Bush, 592, pp. 150, 155.
 v. Cook, 11 Mass. 236, p. 610.
 v. Louder, 42 Law J. Ch. 113, p. 489.
 v. Merryweather, 2 Car. & K. 737, pp. 556, 559.
 v. Stonebroker, 34 Mo. 175, p. 355.
Bakie v. Chandler, 3 Camp. 17, pp. 502, 519.
Balbi v. Duret, 3 Edw. 418, p. 438.
Balch v. Symes, 1 Turn. & R. 192, pp. 615, 622.
 v. Symes, 1 Turn. & R. 87, pp. 613, 616, 618, 621.
Baldwin v. Carleton, 15 La. 395, p. 577.
 v. Latson, 2 Barb. Ch. 306, p. 221.
 v. Latson, 2 Barb. Ch. 307, p. 135.
Baley, Ex parte, 9 Barn. & Cr. 691, p. 173.
Ball, In re, 8 Law R. Com. P. 104, p. 150.
Ball v. Leonard, 24 Ill. 146, p. 386.
Ballard v. Carr, 48 Cal. 74, p. 452.
Balme v. Paver, 1 Jacob, 305, p. 548.
Balsbaugh v. Frazier, 19 Pa. 95, pp. 195, 548, 549.
Baltzell v. Nosler, 356.
Bands v. Bodiner, Carthew, 377, p. 205.
Bankaid v. Baltimore R. R. Co., 39 Md. 197, p. 211.
Bantree v. Watson, 2 Keen, 713, p. 609.
Bank of Hindustan, In re, 3 Law R. Ch. 125, p. 609.
Bank of Utica v. Mersereau, 3 Barb. Ch. 596, pp. 265, 266, 287.
Banks v. Cage, 1 How. (Miss.) 293, p. 150.

- Banks v. Robb*, 14 Brewst. 106, p. 384.
Bank v. French's Executrix, 1 Cranch C. C. 221, p. 278.
 v. Risley, 4 Denio, 480, p. 395.
 v. Govan, 18 Miss. 333, p. 412.
 v. Evans, 18 Miss. 10 Smedes & M. 35, p. 414.
 v. Mersereau, 3 Barb. Ch. 528, pp. 257, 304, 306, 307.
Bank of Conn. v. Bank of Buffalo, 6 Paige, 497, p. 347.
Banyard, Ex parte, 10 Law R. C. P. 638, p. 96.
Barber v. Palmer, 6 Durn. & E. 524; 8 Ibid. 395, p. 203.
Barker v. St. Quentin, 12 Mees. & W. 461, p. 609.
 v. St. Quentin, 12 Mees. & W. 440, p. 625.
Bargaddie Coal Co. v. Wark, 3 Macq. S. C. 688, p. 294.
Barker v. Kuhn, 38 Iowa, 395, pp. 258, 288.
Baron v. Martwell, 9 Dowl. & R. 390, p. 175.
Barker's Case, 49 N. H. 195, p. 156.
Barker v. Company, 3 Thomp. & C. 328, p. 574.
 v. Butler, 2 W. Black. 780; Anon. Lofft. 545, pp. 135, 181, 486, 488.
 v. Brayham, 3 Wils. 368; 2 W. Black. 866, pp. 237, 238, 240, 241.
 v. Dacie, 6 Ves. 681, p. 558.
 v. York, 3 La. An. 90, p. 566.
 v. Hibberd, 54 N. H. 539; S. C. 20 Am. R. 166, p. 573.
Barnard v. Gostling, 1 New Rep. 245, p. 97.
Barnes, Ex parte, 2 B. C. R. 156, p. 97.
Barry v. Whitney, 3 Sand. 696, p. 465.
Barrett v. Bamber, 9 Phila. 202, pp. 454, 457.
Bartholomew v. Langsdale, 35 Ind. 278, p. 560.
Barns v. Strong, 1 Jones Eq. 100, p. 164.
Barnesley v. Powell, Anstr. 102, pp. 606, 607, 608, 610, 612.
Barner v. Harris, 7 Cush. 576, pp. 291, 314.
Barnum v. Kellamy, 4 McLean, 87, p. 382.
Barret v. Third Avenue, 45 N. Y. 628, pp. 379, 397.
Barton v. Baynes, 1 Barnes, 18, p. 619.
Barradaille v. Nelson, 2 Com. Law Rep. 740; 14 Com. B. 655; 18 Jur. 431; 23 Law J. Com. P. 159, p. 547.
Bassett v. Giblett, 2 D. P. C. 650, p. 547.
Baster, In re, 7 Dowl. & L. 296, p. 641.
Basber, In re, 6 Eng. L. & Eq. 368, p. 242.
Bassford v. Blakesley, 6 Beav. 131, p. 308.
Batchelor v. Ellis, 7 T. R. 337, pp. 260, 293, 424, 423, 431, 436.
Bate v. Kinsey, 1 Crompt. M. & R. 38, p. 21.
Bates v. Sturges, 6 Moore & S. 172, p. 230.
 v. Pike, 9 Wis. 224, p. 377.
 v. Pilling, 6 Barn. & C. 38, pp. 237, 238, 241, 243.
Bateman, Ex parte, 6 Q. B. 853, pp. 40, 41, 50.
Bateman, In re, 2 D. P. C. 161, pp. 137, 139.
Bathgate v. Haskin, 59 N. Y. 533, pp. 424, 425, 426, 579.
Bauter v. Levi, 1 Chit. 713, p. 219.
Bawtree v. Watson, 3 Mylne & C. 713, p. 627.
Bayard v. McLane, 3 Harr. 127, pp. 549, 580, 587.
Bayley, Ex parte, 9 Barn. & C. 435, p. 91.
Bayley v. Buckland, 1 W. H. & G. 1, pp. 362, 364, 365.
 v. Thompson, 2 Dowl. 665, p. 99.
Baylor v. Morrison, 2 Bibb. 103, p. 555.
Bayliss v. Grout, 2 Mylne & K. 316, p. 50.
Beard v. Ackerman, 5 Esp. 120, pp. 265, 273, 286, 294.
Beardsley v. Root, 11 Johns. 464, pp. 375, 383.
Beach v. Gregory, 2 Abb. Pr. 206, p. 438.
Bemais v. Hey, 1 Dowl. & L. 661; 7 Jur. 1154; 13 Law J. Q. B. 28, p. 546.
Beardslee v. Boyd, 37 Mo. 180, p. 513.
Bebb, Ex parte, 3 Jur. 772, 24, p. 95.
Becher's Case, 8 Co. 585, p. 41.
Beckwith v. Benner, 6 Car. & P. 681, pp. 277, 301, 319.
Beck v. Lewin, 1 Tidd's Pr. 75, pp. 198, 203.
Beckley v. Neiscomb, 24 N. H. 359, p. 347.
Beck v. Mordaunt, 2 Bing. N. C. 140; 4 Dowl. 112, p. 562.
Beckenden, Ex parte, 1 Har. & W. 193, p. 91.
Beddock, Ex parte, 13 Week. R. 871, p. 87.
Beer v. Ward, 1 Jacob. 77, pp. 287, 297, 436, 517.
Beene v. State, 22 Ark. 157, pp. 141, 142, 146, 150, 155.
Beekman v. Platner, 15 Barb. 550, p. 564.
Beeke v. Penn., 7 Car. & P. 397, p. 559.
Beers v. Hendrickson, 45 N. Y. 665, pp. 402, 410, 411, 413.
Beeson v. Beeson, 9 Pa. 279, p. 285.
Belamy v. French, Law R. 8 Ch. 918; S. C. 7 Moak's Eng. R. 471, pp. 605, 615.
Bellew v. Russell, 1 Brad. & B. 96, p. 135.
Bell v. Bell, 12 Pa. 235, p. 226.
Bell v. Mason, 10 Vt. 509, pp. 229, 231, 447.
Bell v. Ursury, 4 Litt. 334, pp. 347, 369.
Bellew v. Russell, 1 Ball & B. 96, pp. 459, 463, 589.
Belcher v. Godered, 4 Com. B. 472, p. 179.
Bellis, In re, 3 Ben. 386, p. 286.

- Bell *v.* Gate, 1 Taunt. 162, p. 220.
 Bellow *v.* Russell, 1 Ball. & B. 104; 1 Madd. 314, p. 450.
 Beltzhoover *v.* Blackstock, 3 Watts, 20, pp. 271, 285.
 Bendernagle *v.* Cocks, 19 Wend. 151, p. 436.
 Benedict *v.* Stewert, 23 Barb. 420, pp. 627, 580, 588.
 v. Smith, 10 Paige, 126, p. 411.
 Bennett *v.* Dean, 4 M. & G. 638, p. 540.
 Benjamin *v.* Caventry, 19 Wend. 353, p. 316.
 v. Benjamin, 17 Conn. 110, pp. 628, 610.
 Bennett, *Ex parte*, W. W. & D. 210, p. 91.
 Benthall, *Ex parte*, 7 Scott N. R. 407, p. 96.
 Benson *v.* Whitfield, 4 McCord, 149, p. 230.
 Benson, *In re*, 10 Beav. 435, p. 91.
 Bent *v.* Armstead, 2 Keep, 221, p. 449.
 Benton *v.* Craig, 2 Miss. 198, pp. 476, 485.
 v. Garcia, 3 Esp. 149, p. 542.
 Bernard *v.* Winnington, 1 Chit. 188, p. 200.
 Berrie *v.* Howitt, 39 Law J. Ch. 119, p. 615.
 Berrian *v.* McLane, 1 Hoff. Ch. 424, pp. 451, 456, 465, 468.
 Berrington *v.* Phillips, 4 D. P. C. 578; 1 Gale, 404, p. 544.
 Berry *v.* Jenkins, 3 Bing. 423, pp. 220, 152.
 v. State, 10 Ga. 611, p. 211.
 v. Mullen, Irish Rep. 5 Eq. 368, pp. 396, 401.
 Berryman *v.* Wise, 4 Durn. & E. 366, pp. 499, 501.
 Berthold *v.* Fox, 21 Minn. 51, pp. 385, 415.
 Bertline *v.* Baldwin, 29 Ind. 16, p. 476.
 Bethel *v.* Carmack, 2 Md. Ch. 143, pp. 373, 375.
 Bevan *v.* Waters, Moody & M. 325, pp. 286, 294, 309.
 Bevins *v.* Hulme, 15 Mees. & W. 88; 3 Dowl. & L. 722; 15 Law J. Ex. 226, p. 423.
 Bibb *v.* Smith, 1 Dana, 582, pp. 441, 451, 465, 468, 469.
 Bicknell *v.* Dorion, 16 Pick. 978, p. 239.
 Biebinger *v.* Taylor, 64 Mo. 63, p. 485.
 Bierce *v.* Red Bluff Hotel Co., 31 Cal. 160, p. 473.
 Bigler *v.* Ruyher, 43 Ind. 112, p. 293.
 Bignold *v.* Bignold, 11 Ves. 328, p. 548.
 Billings, *Ex parte*, 2 Har. & W. 327, p. 100.
 Billings *v.* Coppack, 1 Ex. 15; 5 Dowl. & L. 126; 16 Law J. Ex. 265, p. 539.
 Bimeler *v.* Dawson, 4 Scam. 538, p. 350.
 Bingham *v.* Gardner, 3 Barb. 64, p. 522.
 Bird *v.* Lovelace, Cary, 88, p. 253.
 Birbeck *v.* Stafford, 14 Abb. Pr. 285; 23 How. Pr. 236, pp. 232, 507, 234, 394, 418, 419.
 Bishop *v.* Garsia, 14 Abb. Pr. 229, N. S. 72, p. 616.
 v. Huggins, 1 Barnes, 31, p. 618.
 v. Latimer, 4 L. T. N. S. 775, p. 248.
 v. Marsh, 8 Scott, 128, p. 197.
 v. Willis, 6 Beav. 83, p. 444.
 Bissel *v.* Briggs, 9 Mass. 462, p. 356.
 Black *v.* Creighton, 2 Molloy, 652, p. 486.
 v. Hersch, 18 Ind. 342, pp. 510, 513, 515.
 Blackburn *v.* Crawfords, 3 Wall. 176, pp. 302, 303.
 Blaikie *v.* Chandlers, 3 Camp. 17, pp. 483, 484.
 Blair *v.* Bromley, 5 Hare, 542; 2 Phill. 354; p. 487.
 v. Bromley, 16 Law J. Ch. 495, pp. 44, 381.
 Blake, *In re*, 3 El. & E. 34; 6 Jur. N. S. 1242; 2 L. T. N. S. 429; 30 Law J. Q. B. 32, pp. 135, 151, 187.
 Bland *v.* De Bough, 6 Com. B. 623; 4 Dowl. & L. 412, p. 540.
 Blank, *Ex parte*, 2 Dowl. O. S. 110, pp. 134, 136, 148, 150.
 Blank *v.* Barton, 2 Chit. 66, p. 184.
 v. Blank, 1 Vent. 197, p. 282.
 Blank, *In re*, 3 Nev. & P. 389, p. 180.
 Blank *v.* Jolland, 8 Ves. 72, pp. 487, 520.
 Blank, *Matter of*, 5 Barn. & Adol. 1088, p. 180.
 Blank *v.* Moore, 1 Maule & S. 284, p. 249.
 v. Yates, 1 Dowl. & R. 9, p. 219.
 Bleakley, *in re*, 5 Paige, 311, pp. 419, 420.
 Bledsoe *v.* White, 42 Tex. 130, p. 447.
 Blewit *v.* Marsden, 10 East, 237, p. 178.
 Bliss, *In re*, 9 Johns. 347, pp. 198, 201.
 Bliss *v.* Ottis, 1 Denio, 656, p. 233.
 Bloomer *v.* Bransome, 6 Dowl. P. C. 490, pp. 427, 429.
 Blundell *v.* Blundell, 1 Dowl. & R. 142; 5 Barn. & Ald. 533, p. 178.
 Blunden *v.* Desarte, 2 Dru. & War. 405, pp. 612, 614, 621.
 Blunt, *Ex parte*, 2 W. Black. 764, pp. 87, 94.
 Blunt *v.* Haslop, 2 D. P. C. 982, p. 590.
 Board *v.* Brodhead, 44 How. Pr. 411, pp. 426, 428.
 v. Parker, 7 East 47, p. 203.
 Boardman *v.* Sill, 1 Camp. 310, p. 621.
 v. Thompson, 25 Iowa, 487, p. 580.
 Bodenhau, *Ex parte*, 8 Ad. & E. 959, pp. 137, 139.
 Bodfish *v.* Fox, 23 Mo. 94, p. 573.
 Bodurthar *v.* Goodrich, 3 Gray, 511, p. 360.
 Bogardus *v.* Livingstone, 7 Abb. Pr. 428, pp. 565, 568.
 v. Richtmeyer, 3 Abb. Pr. 179, pp. 429, 430.
 Bogert *v.* Bogert, 2 Edw. Ch. 399, pp. 278, 284.

- Bohanan *v.* Peterson, 9 Wend. 503, pp. 177, 133, 150.
 Boissy *v.* Lacon, 10 La. An. 29, p. 226.
 Bolden *v.* Nicholay, 3 Jur. N. S. 884, p. 331.
 Bolton, *In re*, 9 Beav. 272, p. 476.
 Bolton *v.* Liverpool, 1 Mylne & K. 88, pp. 517, 254.
 v. Tate, 1 Swanst. 84, pp. 620, 428.
 Bonner, *In re*, 1 Nev. & M. 555; 4 Barn. & Adol. 811, pp. 175, 177.
 In re, 2 Marshb. 48, p. 93.
 Bonsfield, *Ex parte*, 5 Jur. 772, p. 95.
 Booker *v.* Stinchfield, 47 Me. 340, p. 234.
 Borkheim *v.* Company, 38 Cal. 623, p. 358.
 Borney *v.* Morrill, 57 Me. 368, p. 398.
 Borum *v.* Fouts, 15 Ind. 112, p. 293.
 Boston *v.* Craig, 2 Mo. 198, pp. 493, 497.
 v. Haynes, 33 Cal. 31, p. 478.
 Bottomley *v.* Osborne, Peake Ad. Cas. 99, pp. 293, 297.
 Boucher *v.* Schobey, 4 Ind. 583, pp. 441, 516, 510, 513, 515.
 Boulden *v.* Hebel, 17 Serg. & R. 312, p. 228.
 Boulogne *v.* Vautrine, Cowp. 828; S. C. 2 Doug. 467; p. 219.
 Bourdillon *v.* Roche, 27 L. J. Ch. 681, p. 381.
 Bourne *v.* Diggles, 2 Chit. 311, pp. 491, 499, 501, 522.
 Bouser *v.* Bradshaw, 4 Giff. 260; 9 Jur. N. S. 1048; 9 L. T. N. S. 195, p. 612.
 Boucher *v.* Johnson, 2 Browne (Pa.) 17, p. 345.
 Bowie *v.* Hyde, 6 Barb. 392, p. 510.
 Bowles *v.* Stewert, 1 Schoales & L. 227, p. 448.
 v. Senior, 8 Q. B. 677, p. 241.
 Bowling Green Bank *v.* Todd, 52 N. Y. 489, pp. 610, 615.
 Bowman *v.* Norton, 5 Car. & P. 177, pp. 291, 313.
 v. Tallman, 27 How. Pr. 212, pp. 480, 483, 490, 497, 503, 504, 506, 466, 567, 577, 579.
 Bowyer *v.* Hoskins, 1 Younge & J. 199, p. 197.
 Boyd *v.* Stone, 5 Wis. 240, p. 437.
 Boydell *v.* Jones, 7 Dowl. P. C. 210; 4 Mees. & W. 446; 1 Horn. & H. 408, p. 247.
 Boyer *v.* Allen, 2 Barnes R. 42, p. 153.
 v. Clark, 3 Neb. 161, p. 628.
 Boyken *v.* Holden, 6 La. An. 120, pp. 345, 371.
 Boylan *v.* Whitney, 3 Ind. 140, p. 360.
 Box *v.* Barnaby, Hob. 117; Com. Dig. Atty. B. 14, pp. 40, 164, 589.
 Bozon *v.* Bolland, 4 Mylne & C. 354, pp. 611, 615, 623, 624.
 Brabant, *Ex parte*, 2 W. W. & H. 46, p. 100.
 Braceby *v.* Dalton, 2 Strange, 705, p. 312.
 Brackenbury *v.* Pelk, 12 East, 588, p. 497.
 Brackenridge, *In re*, 1 Serg. & R. 187, pp. 81, 130.
 Brackenridge *v.* McFarland, Addis. 49; p. 548.
 Brackett *v.* Norton, 4 Conn. 517, pp. 556, 571, 374.
 v. Sears, 15 Mich. 244, pp. 556, 572, 578.
 Bracy *v.* Carter, 12 Ad. & E. 373, pp. 505, 506, 571.
 Bradford, *Ex parte*, 1 El. & E. 417, p. 88.
 Bradford *v.* Coit, 77 N. C. 72, 486.
 Bradin *v.* Kingland, 4 Watts, 420, pp. 556, 572.
 Bradish *v.* Gee, 1 Amb. 229, p. 350.
 Bradley *v.* Breach, 2 Keb. 275; Jenk. 179; Style, 13, p. 427.
 v. Curran, 2 I. R. C. L. 314, p. 401.
 v. Fisher, 13 Wall. 354, pp. 142, 143, 144, 167, 186.
 Bradley, *Ex parte*, 7 Wall. 364, pp. 142, 146, 167.
 Bradshaw *v.* Bradshaw, 1 Russ. & M. 358, p. 297.
 v. Burton, 7 Dowl. O. S. 329, p. 202.
 Bradstreet *v.* Everson, 72 Pa. 124, pp. 478, 507, 526.
 Bradt *v.* Koon, 4 Cowen, 416, p. 609.
 v. Walton, 8 Johns. 298, pp. 507, 521, 523.
 Bradwell, *In re*, 55 Ill. 535; 16 Wall. 130, p. 76.
 Brady *v.* Carter, 12 Ad. & E. 373, p. 557.
 v. Mayor, 1 Sand. 569, pp. 553, 556, 558.
 v. N. Y. City, 1 Sand. 569, p. 579.
 Brambridge *v.* Massey, 23 Law J. N. S. Ex. 59, pp. 518-520.
 Bramhill, *Ex parte*, Coop. 829, p. 148.
 Bramwell *v.* Lucas, 2 Barn. & C. 745, p. 516; 4 Dowl. & R. 367, pp. 278, 284, 309, 319.
 Branch *v.* Burnby, 1 Call. 127, p. 373.
 Brand *v.* Brand, 39 How. Pr. 193, pp. 253, 286, 291.
 Brandon *v.* Gowing, 7 Rich. 459, p. 285.
 Brandt *v.* Klein, 17 Johns. 335, pp. 294, 386.
 Brane *v.* Spaulding, 52 Pa. 247, p. 497.
 Branger *v.* Butterick, 30 Wis. 153, p. 218.
 Brash *v.* Walton, 8 Johns. 298, p. 589.
 Brassington *v.* Brassington, 1 Sim. & St. 455, pp. 617, 618.
 Braughe *v.* Crodock, 1 Moody & R. 182, pp. 274, 282.
 Bray, *Ex parte*, 2 Dowl. & L. 9, p. 98.
 Brayton *v.* Chase, 3 Wis. 456, pp. 290, 291.
 Brazier *v.* Bryant, 2 Dowl. O. S. 600, pp. 133, 481, 486.
 v. Fortune, 10 Ala. 516, pp. 268.
 Breckenridge *v.* McFarlane, Addis. 49, p. 558.
 Brent *v.* Reeves, 3 La. 10, p. 593.
 Brewer *v.* Cook, 11 La. An. 638, p. 568.

- Bricheno v. Thorp, 1 Jacob, 300, pp. 417, 429, 436, 517.
 Bridges v. Page, 13 Cal. 640, p. 570.
 Bridgton v. Bennett, 23 Me. 420, p. 342.
 Briggs v. Georgia, 10 Vt. 68, pp. 420, 549, 557, 562, 568.
 Briggs, Ex parte, 1 Dowl. & L. 94, pp. 91, 140, 151, 161.
 Brigham v. Foster, 9 Allen, 419, p. 549.
 Bright v. Legerton, 2 DeGex, F. & J. 606, p. 331.
 v. Taylor, 4 Sneed, 159, p. 582.
 Brightmore, Ex parte, 6 Jur. 15, pp. 183, 185.
 Bristol v. Dann, 12 Wend. 142, pp. 163, 223, 469.
 British Co. v. Cobbold, 19 Law R. Eq. 627, pp. 520, 487.
 Briton v. Lorenz, 45 N. Y. 51, pp. 270, 286.
 Broad v. Pitt, 3 Car. & P. 418, pp. 253, 254.
 Broadhurst v. Darlington, 2 D. P. C. 38, p. 543.
 Brock v. Barnes, 40 Barb. 521, pp. 451, 457, 460.
 Bromhead, In re, 16 Law J. Q. B. 365; 5 Dowl. & L. 52, p. 171.
 Bromhead, In re, 16 Law J. Q. B. 353; 5 Dowl. & D. 52, pp. 614, 617.
 Bromley, Ex parte, 2 Dowl. N. S. 388, p. 95.
 Brook v. Collins, 6 Jur. N. S. 999, p. 332.
 v. Montague, Cro. Jac. 90, pp. 47, 208, 216.
 Brooke v. Bryant, 7 Durn. & E. 25, pp. 200, 202.
 Brooks, Ex parte, 1 Bing. 105, p. 181.
 Brooks v. Cavanaugh, 11 La. 183, p. 379.
 v. Day, 2 Dick. 572, pp. 508, 487, 450.
 v. Durham, 55 N. H. 559, p. 404.
 v. Mason, 1 H. Black. 290, p. 541.
 v. Patterson, 2 Johns. Cas. 102; 3 Cowen, 22, p. 204.
 Brotherson v. Consalus, 26 How. Pr. 213, pp. 141, 223, 443, 460.
 Brougher v. Scobey, 23 Ind. 583, p. 497.
 Broughton v. Broughton, 5 De Gex, M. & G. 160; 1 Jur. N. S. 965; 25 L. J. Ch. 250, p. 464.
 Brounsall, Ex parte, Cowp. 829, pp. 141, 147, 148, 150.
 Brown, Ex parte, 2 Miss. 303, pp. 141, 149, 151, 153, 155.
 Brown v. Beauchamp, 5 Mon. 416, p. 164.
 v. Brown, 4 Ind. 627, p. 441.
 v. Dawson, 2 Hogg, 76, pp. 486, 488.
 v. Foster, 1 Hurl. & N. 736; 3 Jur. N. S. 245; 26 Law J. Ex. 249, 280, 283, p. 318.
 v. Howard, 4 Moore, 508, p. 530.
 v. Howard, 2 Brod. & B. 73, p. 498.
 v. Jacobs, 2 Esp. 726, p. 499.
 v. Jewett, 120 Mass. 215, pp. 275, 319.
 Brown v. Kennedy, 33 Beav. 133, p. 54.
 v. Maryland, 12 Wheat. 419, p. 79.
 v. Nichols, 42 N. Y. 27, p. 358.
 v. Payson, 6 N. H. 463, pp. 268, 275, 307.
 v. Pring, 1 Ves. Sr. 407, pp. 445, 468.
 v. State, 16 Ind. 496, p. 382.
 Tibbetts, 11 Com. B. N. S. 855, 541.
 v. Wiggins, 7 L. T. N. S. 622, p. 171.
 Browne v. Hyde, 6 Barb. 392, p. 381.
 v. Sayce, 4 Taunt. 320, p. 618.
 Brunswick, Ex parte, 4 Ex. 492, p. 98.
 Brutton, Ex parte, 18 Jur. 580, p. 87.
 Bryant, Ex parte, 2 Rose, 237; 2 Ves. 407, pp. 605, 609.
 Bryant's Case, 24 N. H. 155, pp. 148, 150, 156, 159.
 Bryan v. Taylor, Wright, 245, pp. 369, 373.
 Bryant v. Williams, 21 Iowa, 329, p. 355.
 Buckland v. Conway, 16 Mass. 366, 396, pp. 366, 375, 405, 549.
 v. Inhabitants, etc. 16 Mass. 396, p. 403.
 Buckle, In re, 2 Dowl. N. S. 476, p. 95.
 Buckler v. Rawlins, 3 Bos. & P. 111, p. 433.
 Bucknall v. Boybell, 7 Scott, 171, p. 544.
 Buffalow v. Buffalow, 2 Dev. & B. Eq. 241, p. 465.
 Bullmer v. Gillman, 4 M. & G. 108; 4 Scott N. R. 781, pp. 483, 490, 505.
 Bullock v. Smith, 25 Ga. 225, p. 211.
 Bumbridge v. Massey, 28 Law J. N. S. Ex. 59, p. 493.
 Bumfield v. James, 2 Barnes, 232, p. 329.
 Bumps, Ex parte, W. W. & D. 530, p. 94.
 Bunberry v. Bunberry, 2 Beav. 173, pp. 263, 290.
 Bunn v. Prather, 21 Ill. 219, 593.
 Burbank v. Company, 24 N. H. 552, p. 379.
 Burchall v. Spottis, 3 Car. & R. 302, p. 317.
 Burke v. Stillwell, 23 Ark. 294, pp. 513, 515.
 Burger, Ex parte, 1 Dowl. N. S. 292, p. 153.
 Burgess v. Abbott, 6 Hill, 135, p. 436.
 Burghart v. Augerstein, 3 Car. & P. 690, pp. 316, 393.
 v. Gardner, 3 Barb. 64, pp. 565, 566.
 Burgin, Ex parte, 1 Dowl. N. S. 292, p. 185.
 Burn v. Passmore, 2 Dowl. O. S. 550, p. 202.
 Burnap v. Marsh, 13 Ill. 535, pp. 230, 240.
 Burnside v. Terry, 51 Ga. 186, p. 278.
 Burr v. Atwood, 1 Salk. 89, p. 424.

- Burrill, *Ex parte*, 11 Jur. 1062, p. 167.
 Burrill v. Jones, 3 Barn. & Ald. 47, pp. 136, 137, 139, 231, 235.
 Burroughs v. Lock, 10 Ves. 470, p. 448.
 Burr's Case, 1 Wh. C. C. 503; 9 Wheat. 530, pp. 142, 146, 148, 150, 153.
 Burton v. Chatterton, 3 Barn. & Ald. 486; 2 Stark. 522, p. 545.
 v. Chesterfield, 9 Jur. 373, p. 162.
 v. Hynson, 14 Ark. 32, p. 478.
 v. Wiley, 26 Vt. 430, p. 478.
 Busey v. Hardin, 2 B. Mon. 407, p. 459.
 Bush, *Ex parte*, 7 Vin. Abr. 74, p. 614.
 In re, 8 Beav. 66, p. 540.
 Bushell's Case, Vaughn, 135, p. 143.
 Busk v. Lewis, 6 Mad. 29, p. 618.
 Butler v. Allcorn, 8 Tex. 56, p. 419.
 v. Jones, 7 How. (Miss.) 587, p. 524.
 v. Knight, Law R. 2 Ex. 109, pp. 395, 409, 410, 414, 426.
 Butterworth v. Kinsey, 14 Tex. 500, pp. 598, 599.
 Butt's Case, 1 Roll. Abr. 489, pp. 197, 203.
 Byne v. Stewart, 3 Dessaus. 466, p. 74, 81.
 Byre v. Odem, 9 Ala. 755, p. 164.
 Byres v. Surget, 19 How. 303, p. 461.
- C.**
- Caine v. Martin, 4 Lond. Jur. 500; 2 Beav. 584, p. 522.
 Cahill v. Benn, 6 Binn. 99, p. 405.
 Calder v. Bull, 3 Dallas, 386, p. 69.
 v. Halket, 3 Moore F. C. C. 28, p. 170.
 Caldwell v. Shepard, 6 Mon. 392, pp. 549, 558, 580.
 Calkins v. Lee, 2 Root, 363, p. 262.
 Calley v. Richards, 19 Beav. 401, pp. 286, 313.
 Calleford v. Warren, 5 Barn. & C. 220, p. 178.
 Calmes v. Stone, 7 La. An. 133, p. 391.
 Calverly v. Bieseley, Dyer, 180a, p. 326.
 Camden v. Edee, 1 H. Black. 21, pp. 182, 183.
 Cameron v. Clark, 11 Ala. 259, p. 514.
 Campbell, *Ex parte*, Law R. 5 Ch. p. 319.
 Campbell v. Bristol, 19 Wend. 101, pp. 347, 355, 362.
 v. Bailey, 19 Ibid. 172, pp. 380, 405.
 v. Benjamin, 69 Ill. 244, p. 407.
 v. Kincaid, 37 B. Mon. 566, pp. 381, 425, 426, 438, 565.
 Campbell's Admr's v. Boggs, 11 Wright, 324, pp. 446, 487.
 Campbell v. Arcenaux, 6 La. An. 120, p. 370.
 v. Galbraith, 5 Watts, 423, p. 341.
 v. Jones, 4 Wend. 306, p. 163.
 Canceium v. The People, 18 N. Y. 128, p. 382.
 Cane v. Martin, 2 Beav. 584, p. 617.
 Canterbury v. Commonwealth, 1 Dana, 416, p. 402.
 Cantrell v. Chirm, 5 Sneed, 116, p. 604.
 Carborne v. Barshaw, 2 Beav. 76, p. 456.
 Cardross, *In re*, 7 D. P. C. 861, pp. 138, 176.
 Card v. Wallridge, 18 Ohio, 411, pp. 374, 412.
 Carleton v. Bickford, 13 Gray, 591, p. 353.
 Carmichael v. Pendleton, Dud. (Ga.) 173, 233.
 Carnes v. Platt, 15 Abb. Pr. N. S. 337; S. C. 36 N. Y. Superior Court, 361, pp. 270, 292.
 Carratt v. Morley, 1 Q. B. 18, pp. 237, 241.
 Carr, *Ex parte*, 3 Q. B. 447, pp. 87, 95.
 Carr v. Weld, 15 N. J. L. 314, p. 261.
 Carrett v. Smallpage, 9 East, 330, p. 502.
 Carrington v. Holabird, 17 Conn. 530, p. 225.
 Carroll Co. v. Cheatham, 48 Mo. 385, pp. 401, 402.
 Carpenter v. Mitchell, 50 Ill. 470, p. 76.
 Carpentier v. Dane Co., 9 Wis. 277, p. 324.
 v. Oakland, 30 Cal. 439, p. 355.
 Carpmael v. Powis, Phill. 687, pp. 257, 290, 291, 319.
 Carstens v. Barnestorff, 11 Abb. Pr. 385.
 Carter v. Bennett, 6 Fla. 214, p. 626.
 v. Carter, 8 Law J. N. S. 692, p. 544.
 v. Davis, 8 Fla. 183, pp. 610, 628.
 v. Palmer, 8 Clark & F. 657, pp. 456, 460, 466.
 v. Fallcott, 10 Vt. 471, pp. 380, 413, 418.
 v. James, 2 Moody & R. 47, p. 294.
 v. New Orleans, etc., 5 Rob. (La.) 33, p. 602.
 Cartley, *Ex parte*, 12 Law J. Q. B. 98, p. 91.
 Cartwell, *Ex parte*, 6 Jur. 950, p. 91.
 Cartwell v. Menifee, 2 Ark. 356, pp. 341, 345.
 Carver v. Mealey, 1 Greene, 360, p. 373.
 v. United States, 7 Ct. of Cl. 499, p. 438.
 Caruley, *Ex parte*, 2 Dowl. N. S. 945, p. 91.
 Case v. Hotchkiss, 1 Abb. N. Y. App. 324, p. 554, 569.
 Castle's Case, 16 Ves. 412, pp. 199, 200.
 Cass v. Nibbett, 1 Chit. 745, p. 156.
 Castro v. Bennet, 2 Johns. 296, pp. 480, 491, 521.
 Cathies, *In re*, 6 Dowl. & L. 566; 7 Com. B. 136, pp. 541, 544.
 Catt v. Towle, 19 Week. R. 56, p. 264.
 Cawdry v. Higley, Cro. Cas. 270, p. 245.
 Chaddock v. Briggs, 13 Mass. 248, p. 245.

- Chadwick v. Huff, 2 Crompt. M. & R. 29, p. 99.
 Chahoon v. Commonwealth, 21 Gratt. 822, pp. 258, 272.
 Chambers v. Brigman, 68 N. C. 274, p. 212.
 v. Hodges, 23 Tex. 104, pp. 375, 386.
 v. Mason, 5 Com. B. N. S. 59, pp. 390, 395, 396, 400, 52.
 v. Miller, 7 Watts, 63, p. 374.
 Champ v. Stokes, 6 Hurl. & N. 683; 7 Jur. N. S. p. 540.
 Champertown v. Scott, 6 Madd. 93, pp. 615, 618.
 Champion v. King, 6 Jur. 35, pp. 556, 559.
 v. State, 3 Cald. 114, pp. 63, 68, 81.
 Chandler v. Brickness, 4 Cowen, 49, pp. 238, 154, 155.
 Chant v. Brown, 9 Hare, 790, pp. 291, 313, 258.
 Chapman v. Austin, 44 Tex. 133, p. 355.
 v. Burt, p. 513.
 v. Chapman, Law R. 9 Eq. 276, pp. 487, 502, 518, 520.
 v. Cowles, 14 Ala. 103, pp. 380, 405, 411.
 v. Haw, 1 Taunt. 341, pp. 622, 625, 629.
 v. Phillips, 8 Pick. 24, p. 235.
 v. Van Toll, 8 El. & B. 407, pp. 483, 504, 505.
 Chapman, Ex parte, 3 D. P. C. 562, p. 91.
 Chapel v. Staines, 2 Mees. & W. 580; 5 D. P. C. 770; M. & H. 265; Jur. 740, p. 546.
 Chapped v. Smite, 17 Ga. 68, p. 284.
 Charlwood v. Berridge, 1 Esp. 345, p. 623.
 Charlton v. Coombes, 4 Giff. 372, pp. 307, 313.
 Charwick, Ex parte, 3 Lond. Jur. 23, p. 167.
 Chataque Co. Bank v. Risley, 4 Denio, 480, pp. 422, 425.
 Chaunt v. Smart, 1 Bos. & P. 477, p. 185.
 Cheeves v. Merrick, 2 N. H. 376, p. 376.
 Chew v. The Bank, 2 Md. Ch. 231, p. 285.
 Chester v. Apperson, 4 Heisk. 639, p. 350.
 Chicago Bank v. Larned, 26 Ill. 218, pp. 565, 566.
 Chirac v. Reinicker, 11 Wheat. 280, pp. 516, 262, 290, 319.
 Childs v. Delaney, 1 Thomp. & C. 506, p. 270.
 v. Dwight, 7 Paige 615, pp. 241, 242, 405.
 Child v. Eureka, 44 N. H. 354, p. 374.
 Chivers v. Ten, 2 Show. 161, p. 330.
 Child v. Powder Works, 44 N. H. 354, p. 383.
 Chillicothe Co. v. Jameson, 48 Ill. 281, pp. 310, 317.
 Chile v. Roe, 1 El. & B. 279, p. 393.
 Child v. Dwight, 1 Dev. & B. Eq. 171, p. 374.
 v. Irish, 1 McArthur. 1, p. 165.
 Cholmondeley v. Clinton, 19 Ves. 261, pp. 257, 313, 321, 416, 429, 434, 436, 438, 506, 517, 528.
 Chown v. Parrott, 14 Com. B. N. S. 74, p. 395.
 Christian, Ex parte, 3 Moore, 578, p. 97.
 Christie v. Sawyer, 44 N. H. 298, pp. 297, 398.
 Christy v. Douglas, Wright, 485, pp. 503, 594, 599, 558, 574, 589, 515, 549.
 Churchyard v. Watkins, 27 Law J. Ex. 13, p. 395.
 Church v. Drummond, 7 Ind. 17, 218, p. 218.
 v. Cornack, 2 Ind. Ch. 143, pp. 375, 386.
 v. Mumford, 11 Johns. 479, p. 522.
 Citizens' Bank v. Culver, 54 N. H. 327, pp. 610, 611.
 City v. Helland, 67 Ill. 278, p. 384.
 Cincinnati Gas Co. v. Timber Lake, 10 Ohio, p. 217.
 Claggett v. Phillips, 2 Younge & C. 82, p. 266.
 Clark, Ex parte, 3 Barn. & Ald. 610, pp. 91, 94, 97, 96.
 v. Carlon, 7 Jur. N. S. 441; 30 Law J. Ch. 639, p. 464.
 v. Clark, 1 Moody & R. 3, pp. 258, 290.
 v. Courser, 29 N. H. 170, p. 382.
 v. Donovan, 5 T. R. 694; 1 Esp. 137, pp. 539, 545.
 v. Gilbert, 2 Bing. S. C. 353, p. 621.
 Clarke v. Gorman, 3 Taunt. 493, pp. 198, 151.
 v. Holliday, 9 Miss. 711, p. 344.
 Clark v. Kingland, 9 Miss. 248, p. 405.
 v. Marshall, 34 Mo. 429, p. 518.
 v. Paine, 11 Pick. 66, p. 235.
 v. Randall, 9 Wis. 135, pp. 380, 385.
 v. Richards, 3 E. D. Smith 89, pp. 314, 374.
 v. Smith, 1 Dowl. & L. 960, p. 609.
 v. Swaile, 2 Eden, 134, p. 463.
 v. Willett, 35 Cal. 534, pp. 342, 348, 349.
 Clay v. Williams, 2 Munf. 105, pp. 306, 516.
 Cleave v. Jones, 6 Ex. 573, pp. 264, 273, 281.
 Cleavinger v. Reimer, 3 Watts. & S. 348, pp. 462, 442, 466.
 Cleeve v. Powell, 1 Mood. & R. 288, p. 274.
 Clement v. Crossman, 8 Johns. 287, p. 436.
 Clendinen v. Black, 2 Bail. 448, pp. 349, 556, 558.

- Cliff *v.* Prosser, 2 D. P. C. 62, pp. 405, 474, 48.
 Clifford *v.* Porter, 5 Dowl. 226, p. 147.
 Clifton, *Ex parte*, 5 D. P. C. 218, p. 137.
 Clussman *v.* Merkel, 3 Bos. 402, pp. 387, 508, 520.
 Clutterbuck *v.* Hulls, 4 Dowl. & L. 30, p. 201.
 Clutton *v.* Pardon, 1 Turn. & R. 301, p. 620.
 Coates *v.* Birch, 2 B. 252; 4 Wash. C. 718, pp. 260, 294, 298, 309.
 Cobden *v.* Kendricks, 4 T. R. 431, pp. 254, 516.
 Cobbelt *v.* Hudson, 1 El. & B. 11, p. 226.
 Cocks *v.* Brewer, 11 Mees. & W. 51; 2 Dowl. 000, p. 436.
 v. Harmon, 6 East, 404; 2 Smith, 409, pp. 173, 619, 620.
 Codrington *v.* Lloyd, 8 Ad. & E. 449, & P. 442; 1 W. W. & H. 358, pp. 237, 238, 240, 241.
 Coe *v.* Smith, 4 Ind. 79, p. 555.
 Coffin *v.* Coffin, 7 Greenl. 77 Ill. 337, pp. 513, 514.
 Cohen *v.* Wright, 22 Cal. 293, pp. 68, 75, 133, 153.
 Coit *v.* Sheldon, 1 Tyler, 304, p. 229.
 Cokes *v.* Hutton, 2 Russ. 357, p. 92.
 Coke *v.* Allen, 8 Mod. 77, p. 326.
 Coke *v.* McClellan, 4 Hill, 59, p. 201.
 Coleman *v.* Grubb, 23 Pa. 393, p. 404.
 Colegrave *v.* Manley, 1 Turn. & R. 401, pp. 434, 617, 620.
 Cole *v.* Bennett, 6 Price, 15, p. 625.
 Cole, *Ex parte*, 1 Doug. 114, pp. 100, 167.
 Cole *v.* Grove, 1 Scott, N. R. 50, pp. 134, 160.
 v. McClellan, 4 Hill, 60, p. 134.
 Colland, *Ex parte*, 2 B. & A. 315, p. 100.
 Collier *v.* Nokes, 2 Car. & K. 1012, p. 317.
 Collins *v.* Brook, 5 Hurl. & N. 700; 29 Law. J. Ex. 255, p. 332.
 Colledge *v.* Horn, 3 Bing. 119, p. 390.
 Collett *v.* Challis, 11 L. T. 245; 2 Ex. 484, p. 402.
 v. Foster, 2 Hurl. & N. 356, p. 386.
 Collins *v.* Arnold, 1 B. C. R. 217, p. 427.
 v. Brook, Fost. & F. 407; 4 Hurl. & N. 270; 28 Law J. Ex. 143, p. 585.
 v. Griffith, Barnes, 37, p. 507.
 v. Johnson, 16 Com. B. 588, p. 140.
 Collins, *In re*, 18 Com. B. 272, pp. 154, 162.
 Collins *v.* Nicholson, 2 Taunt. 321, p. 545.
 Collins, *Ex parte*, 2 Va. Cas. 222, pp. 81, 94, 162.
 Colledge *v.* Horn, 5 Bing. 119, p. 53.
 Collmer *v.* Ede, 40 Law J. Ch. 185, p. 615.
 Colton *v.* Sharpstein, 14 Wis. 446, pp. 514, 515
 Combe *v.* London, 1 Russ. 631, p. 292.
 Commonwealth *v.* Austin, 7 Gray, 51, p. 214.
 v. Brackenridge, 1 Serg. & R. 187, p. 161.
 v. Gibbs, 4 Gray, 146, pp. 221, 454.
 v. Murphy, 10 Gray, 1, p. 214.
 v. Newton, 1 Gratt. 453, p. 156.
 v. Porter, 10 Met. 263, p. 214.
 Commissioners *v.* Younger, 26 Cal. 147, pp. 348, 385.
 v. Rose, 1 Desaus. 469, pp. 373, 380.
 Commins *v.* McLain, 2 Ark. 402, p. 421.
 Commerell *v.* Payton, 1 Swanst. 1, pp. 617, 622.
 v. Boynston, Swanst. 1, p. 620.
 Commander *v.* Carrollton, 15 La. An. 7, p. 568.
 Compton *v.* Chandless, 3 Camp. 17, 19, p. 519.
 Comrodden, *Ex parte*, 10 L. B. Q. B. 138, p. 96.
 Connecticut Mut. Life Ins. Co. *v.* Shafer, 4 Otto U. S. 457, p. 266.
 Cooley *v.* Cecile, 8 La. An. 61, p. 125.
 v. Doherty, 5 La. An. 163, pp. 569, 585.
 Connop *v.* Challis, 2 Ex. 484; 6 Dowl. & L. 48; 17 Law J. Ex. 319, pp. 377, 409.
 Conway *v.* Smith, 13 Wis. 125, p. 76.
 Cooke *v.* Newell, 40 Conn. 596, p. 560.
 v. Bloodgood, 7 Ala. N. S. 683, p. 402.
 Cooper, *Ex parte*, 22 N. Y. 81, pp. 66, 74.
 Cooper *v.* Stephenson, 12 Eng. L. & E. 403, pp. 493, 518, 519, 520.
 Cooper, *Ex parte*, 5 D. P. C. 703, pp. 95, 546, 66, 74.
 Cooper & Moss *v.* Hamilton, 52 Ill. 119, pp. 332.
 Cooper *v.* Carr, 8 Johns. 360, p. 417.
 v. Harrison, 2 Younge & C. 514, p. 621.
 Coopwood *v.* Wallace, 12 Ala. 790, pp. 580, 602, 621.
 v. Baldwin, 25 Miss. 129, pp. 486, 133, 495, 496.
 Cook *v.* Gilliard, 1 El. & B. 26; 17 Jur. 137; 22 Law J. p. 543.
 v. Hearn, 1 Moody & R. 201, pp. 293, 297.
 v. Mackrell, 70 Pa. 12, p. 559.
 v. Ritter, 4 E. D. Smith, 253, pp. 211, 419, 420, 422, 490.
 v. Rhodes, 19 Ves. 273; 3 Ves. & B. 177, pp. 416, 434, 506.
 v. Settree, 1 Ves. & B. 127, pp. 547, 548.
 v. Wright, Ryan & M. 278, pp. 237, 386.
 Copeland *v.* Watts, 1 Stark. 95, p. 298.

- Coppinger v. Lynnot, 3 Ir. C. L. R. 563, p. 560.
 Corey v. Russell, 4 Wend. 204, p. 201.
 Corvin v. Mulligan, 1 Bush. 297, p. 405.
 Corneilus v. Harrison, 2 Fost. & F. 758, p. 162.
 Corning v. Cooper, 7 Paige, 587, p. 417.
 v. Southlard, 3 Hill, 552, pp. 383, 406, 412, 415.
 Cort v. Sheldon, 1 Tyler, 300, p. 523.
 Corpus Christi College, 6 Taunt. 105, p. 620.
 Cose v. Carroll, 35 N. Y. 385, pp. 457, 460, 425, 465.
 Cosens v. Graham, 12 Com. B. 398; 16 Jur. 952; 21 Law J. P. 205, p. 543.
 Cost v. Genetle, 1 Port. 212, p. 380.
 Cossels v. Usury, 51 Ga. 621, p. 387.
 County Assurance Co., 38 Law J. Ch. p. 615.
 Courtail v. Thomas, 9 Barn. & C. 288; 4 Man. & R. 218, pp. 301, 311, 312.
 Court v. Gilbert, 2 Barn. 263, p. 621.
 Cousins v. Paddon, 2 Crompt. M. & P. 547, pp. 556, 571, 506.
 v. State, 50 Ala. 413, p. 79.
 v. Purdey, 36 Barb. 266, p. 344.
 Covell v. Betterley, 4 Moore & S. 265; 10 Bing. 432, p. 617.
 Coveney v. Tannahill, 1 Hill, 33, pp. 263, 268, 286, 305, 306, 307, 309, 313, 150.
 Cowell v. Simpson, 16 Ves. 275, pp. 615, 622.
 Cower's Case, Noy, 112, p. 198.
 Cowder v. Shee, 1 Camp. 437, p. 541.
 Cox v. Bockett, 11 Jur. N. S. 88; 34 Law J. C. P. 125, 171; 13 Week. R. 292; 11 L. T. N. S. 629, p. 171.
 v. Company, 63 N. Y. 414; R. S. C. 4 Hun. 176; 6 Thomp. & C. 405, p. 406.
 c. Leech, 1 Com. B. N. S. 617, pp. 483, 488, 494, 495.
 v. Livingstone, 2 Watts & S. 103, pp. 485, 490, 491, 493, 472, 476, 478, 481, 509, 571.
 v. Nichols, 2 Yeates, 547, 345.
 v. Phillips, Cas. 7 Hardw. 257; 8 Mod. 109, p. 180.
 v. Sullivan, 7 Ga. 144, pp. 472, 473, 483, 484, 50.
 Cozzens v. Whitney, 3 R. I. 79, p. 610.
 Cradock v. Piper, 1 Macn. & G. 664, p. 464.
 Cragg, Ex parte, 6 D. P. C. 256, p. 95.
 Craig v. Scott, Wend. 35, p. 219.
 Craig v. Mansfeld, 1 Ves. 379, pp. 467, 511.
 v. Ely, 5 Stewt. & P. 354, pp. 374, 380.
 v. Watson, 8 Beav. 427, pp. 449, 44, 508, 520.
 Crandall v. People, 2 Ins. 309, p. 212.
 Crary v. Turner, 6 Johns. 53, p. 383.
 Craven v. Stubbins, 10 Jur. N. S. 1189, p. 91.
 Crawford v. McKissack, 1 Port. 433, p. 268.
 Creighton v. Ingersoll, 20 Barb. 541, p. 607.
 Cregier v. Cheesebrough, 25 How. Pr. 200, pp. 623, 428, 574.
 Creswell, Ex parte, 5 Dowl. O. S. 689, p. 176.
 Creswell v. Byron, 14 Ves. 272, pp. 491, 433, 570, 622, 624.
 Creswell, In re, 1 Jur. 755, p. 159.
 Cretwell, In re, v. Fosbrooke, 1 Lond. Jur. 755, p. 176.
 Cripwell, Ex parte, 5 D. P. C. 689; W. W. & D. 365; 1 Jur. 755, p. 175.
 Crisp v. Platell, 8 Beav. 62, p. 303.
 Crissler v. Garland, 19 Miss. 136, p. 292.
 Critchfield v. Porter, 3 Ohio, 518, pp. 354, 355, 360.
 Crittendon v. Strother, 2 Cranch C. C. 464, pp. 287, 316.
 Crocker v. Hutchinson, 2 Chip. 117, pp. 477, 480, 482, 485.
 Croft, Ex parte, 5 Nev. & M. 58, p. 94.
 Croft v. Hicks, 26 Tex. 383, p. 510.
 Cromack v. Heathcote, 2 Ball & B. 4, pp. 257, 258, 284, 304.
 Crook v. Wright, Ryan & M. 278, pp. 243, 330, 331.
 Crooker v. Hutchings, 2 Chip. 117, p. 528.
 Crossby v. Berger, 11 Paige, 377, pp. 258, 309, 316, 317, 263, 294.
 Cross v. Riggins, 50 Mo. 335, pp. 261, 271.
 Cross, Ex parte, 2 Dowl. N. S. 292, p. 87.
 Crossley, In re, 6 T. R. 701, pp. 157, 181.
 Cross v. Kaye, 6 Durn. & E. 663, p. 97.
 Crotty v. Mackenzie, 52 How. Pr. 54, p. 606.
 Crosley v. Murphy, 8 Ir. Com. L. R. 301, pp. 434, 484.
 Crothers v. Lee, 29 Ala. 337, p. 514.
 Crouder v. Davis, 3 Tyrw. & G. 433, p. 44.
 Crozer v. Pilling, 4 Barn. & C. 26, pp. 238, 241, 423.
 Culliford, Ex parte, 8 Barn. & C. 220, p. 175.
 Cullough v. Guetner, 1 Binn. 214, 469, p. 337.
 Cummings v. Missouri, 4 Wall. 277, p. 71.
 v. Naggoner, 7 Paige, 603, p. 135.
 Cummins v. McLain, 2 Pike, 402, pp. 478, 513, 514, 515.
 Cunningham, Ex parte, 7 Moore, 410, pp. 91, 97.
 Cunliffe, Ex parte, 3 Dowl. & L. 548, p. 94.
 Curlew v. Brod, 1 Hurl. & C. 322, pp. 477, 489.
 Currie v. Cowles, 2 Bosw. 542, pp. 506, 556, 571.
 Currier v. R. R., 37 N. H. 223, pp. 610, 625.
 Cushman v. Brown, 6 Paige, 6 Paige, 539, p. 233.
 Cuthbert, Ex parte, 1 Madd. 78, p. 179.
 Cutts v. Pickering, 1 Vent. 197, pp. 263, 286, 310.

Cutts *v.* Solomon, 12 Eng. L. & Eq. 316, pp. 452, 457.
 Cutting *v.* Way, 20 N. H. 120, p. 446.
 Cyphert *v.* McClune, 22 Pa. 195, pp. 343, 344, 354, 358.

D.

- Daingerfield's Executors *v.* Thurston's Heirs, 8 Martin N. S. 232, p. 424.
 Daggett, *Ex parte*, 1 Town. M. & P. 1, p. 96.
 Dakin, *In re*, 4 Hill 44, pp. 173, 176, 134.
 Dale *v.* Livingston, 4 Wend. 558, pp. 152, 294.
 Dalon *v.* Lewis, 7 How. 132, p. 435.
 Dalton, *Ex parte*, 9 D. P. C. 110, p. 87.
 Daniel *v.* Daniel, 39 Penn. 191, p. 319.
 v. Ray, 1 Hill (S. C.) 32, p. 388.
 Danley *v.* Crawl, 28 Ark. 95, p. 383.
 Danforth *v.* Streeter, 28 Vt. 490, p. 165.
 Darby *v.* Kapp, 2 Mo. Appeal Reports 486, p. 576.
 Darbell, *Ex parte*, 1 W. W. & H. 174, p. 91.
 Danby *v.* Crave, 28 Ark. 95, p. 303.
 D'Arcey *v.* Ketchum, 11 How. 165, p. 356.
 Dartmouth *v.* Holdworth, 10 Sim. 476, p. 376.
 Dartwell *v.* Howard, 4 Barn. & C. 348, pp. 449, 508, 519, 520.
 Dauntly *v.* Hyde, 6 Jur. 163, pp. 477, 493.
 Davenport *v.* Commonwealth, 1 Leigh 588, p. 213.
 Davey's Case, March, 141; Pl. 214, p. 196.
 Davidson *v.* Rozier, 23 Mo. 387, pp. 397, 398.
 v. Heffron, 31 Ind. 687, p. 485.
 v. Napier, 1 Sim. 247, p. 621.
 Davies *v.* Jenkins, 11 Mees. & W. 745; 1 Dowl. & L. 321; 12 Law J. N. S. Exch. 386, pp. 240, 477.
 v. Eyton, 3 Barn. & Adol. 785, pp. 331, 369.
 v. Loundes, 3 Com. B. 808, pp. 427, 431, 438, 608, 609, 610.
 Davis, *Ex parte*, 1 Chit. p. 97.
 v. Downer, 10 Vt. 529, pp. 558, 563.
 v. Dysart, 21 Beav. 124; 1 Jur. N. S. 1153; 25 Law J. Ch. 122, 322, p. 244.
 v. Edmondson, 3 Bos. & P. 282, p. 96.
 v. Jones, 5 Dowl. 503, p. 423.
 v. Lee, 20 La. An. 248, p. 405.
 v. Peck, 54 Barb. 423, p. 600.
 v. Ruff, Cheves 17, p. 245.
 v. Sharron, 15 Mon. 64, pp. 588, 592, 165.
 v. Smith, 43 Vt. 269, pp. 460, 465, 579.
 Davis *v.* State, 33 Ga. 98, p. 211.
 Davies *v.* Waters, 9 Mees. & W. 608, pp. 259, 294, 317.
 Dawson *v.* Lawley, 4 Esp., pp. 327, 527.
 Daw *v.* Eley, 2 Hem. & M. 725, pp. 288, 150.
 Dax *v.* Ward, 1 Stark. 409, pp. 571, 504.
 Day *v.* Adams, 36 N. C. 254, p. 342.
 v. Wells, 31 Conn. 344, p. 415.
 v. Butler, 3 Wils. 59, p. 246.
 Deane, *Ex parte*, 2 Dowl. O. S. 533, pp. 173, 176.
 Dean, *In re*, 2 Mont. D. & D. 438, p. 614.
 Dearborn *v.* Dearborn, 15 Mass. 316, pp. 498, 509, 501, 436, 476, 477, 480, 482, 485, 494, 495, 497.
 Deardon, *In re*, 9 Ex. 210, 17 Jur. 993, p. 546.
 Ex parte, 5 Exch. 740, p. 76.
 De Armas' Case, 10 Mart. 123, p. 141.
 De Bay *v.* Griffen, Law Rep. 10 Ch. Ap. 291; S. C. 12 Mook's Eng. R. 731, p. 605.
 Decuir *v.* Lejeune, 15 La. An. 569, p. 344.
 De Faur *v.* Sigel, 4 Perry & G.; Madd. & G. 20, p. 91.
 De Figanrere *v.* Young, 2 Robt. 671, p. 627.
 De Firas, *Ex parte*, 4 Best & Smith, 992, p. 87.
 Delaplaine *v.* Crenshaw, 15 Gratt. 457, 213, p. 213.
 Delaware Ins. Co. *v.* Gilpin, 1 Binn. 501, p. 558.
 De Montmorency *v.* Devereaux, 8 Clark & F. 228, p. 449.
 De Medina, *In re*, 10 Week. R. 627; Law T. N. S. 536, p. 188.
 Dennett *v.* Cutts, 11 N. H. 163, pp. 611, 612, 615.
 Denton *v.* Noyes, 6 Johns. 296, pp. 343, 345, 354, 359, 362, 381.
 v. Embury, 10 Ark. 228, pp. 510, 513, 514, 515.
 Dent, *Ex parte*, 1 Barn. & Ald. 189, p. 97.
 Dendt *v.* Barham, 9 Ex. 467; 2 Car. Law Rep. 989; 18 Jur. 295; 23 Law J. Ex. 161, p. 541.
 Dent *v.* Halifax, 1 Taunt. 493, p. 330.
 De Rose *v.* Fay, 4 Edw. Ch. 40, pp. 451, 457, 468.
 De Rouffingy *v.* Peale, 3 Taunt. 484, pp. 135, 445, 468, 488, 489, 495.
 Derrickson *v.* Cady, 7 Barr. 27, pp. 496, 501.
 Derwort *v.* Loomer, 21 Conn. 145, pp. 397, 398.
 Desborough *v.* Rawlins, 3 Mylne & C. 515, pp. 272, 311, 362.
 De Vinney *v.* Morris, 9 Watts, 314, p. 318, 461.
 De Voy's Lessee *v.* Burke, 2 Fox & S. 191, p. 309.
 De Wolf *v.* Strader, 26 Ill. 225, pp. 291, 565.
 De Wolfe *v.* ———, 2 Chit. 68, pp. 133, 176.

- De Witt v. Perkins, 22 Wis. 473, p. 276.
 Dicas v. Stokely, 7 Car. & P. 587, p. 621.
 v. Warm, 2 Dowl. 812, p. 147.
 Dicken's Case, 67 Pa. 169, pp. 146, 148, 193.
 Dibbee v. Trulock, 12 Fla. 185, p. 176.
 Dickerson v. Burke, 25 Ga. 225, p. 211.
 Dickenson v. Duston, 21 Mich. 561, pp. 152, 155, 156, 158.
 Dickley v. Ferris, 11 Com. B. 457, p. 162.
 Dietrick v. Mitchell, 43 Ill. 40, p. 307.
 Deitz v. McCallum, 44 How. Pr. 493, p. 625.
 Dillon v. State, 6 Tex. 55, p. 141.
 Dirks v. Richards, 5 Scott N. R. 534, p. 621.
 Ditcher v. Kendrick, 1 Car. & P. 161, pp. 298, 311.
 Dixon v. Edwards, 2 Anstr. 356, p. 219.
 v. Parmelee, Crary, 88, pp. 253, 289, 293.
 v. Williams, 4 De Gex & J. 208, pp. 487, 520.
 Dixon, In re, 3 Jur. N. S. 29; Law J. Ch. 89, p. 547.
 Dobbins v. Dupree, 39 Ga. 394, pp. 327, 358.
 v. Oswalt, 20 Ark. p. 215.
 Dodd v. Dodd, 9 Pa. 315, pp. 397, 398.
 v. Brott, 1 Minn. 270, p. 611.
 Doe v. Andrews, 2 Comp. 845, pp. 288, 299, 306.
 v. Branson, 6 Dowl. 490, pp. 427, 433.
 Doe d. Cooke v. Roe, 1 Barnes, pp. 319, 327.
 Doe v. Eaton, 3 Barn. & Ald. 785, p. 362.
 Doe d. v. Gilbert, 5 Ross; 7 Mees. & W. pp. 295, 301.
 Doe v. Harris, 5 Car. & P. 592, pp. 304, 308.
 v. James, 2 Moody & R. 47, p. 285.
 Doe d. Jupp v. Andrews, Cowp. 845, p. 283.
 v. Martin, 4 T. R. 39, p. 448.
 Doe v. Phillips, 2 Chit. 170, p. 369.
 v. Roe, 3 Dowl. O. S. 496, p. 368.
 v. Seaton, 2 Ad. & E. 171, pp. 314, 301.
 v. Langdon, 11 Ad. & E. N. S. 711, p. 295.
 v. Richards, 2 Car. & K. 216, p. 390.
 v. Watkins, 3 Bing. N. C. 121, p. 314.
 Donaldson v. Holdane, 7 Clark & F. 762, pp. 483, 508, 522.
 Donne, In re, 3 Swanst. 96, p. 85.
 Dooley v. Great Northern Railway Co. 4 Cl. & B. 341, p. 575.
 Dorsey v. Credo, 5 Martin N. S. 399, p. 377.
 v. Goodman, Wright, 120, p. 565.
 Dorsey's Case, 7 Porter, 293, pp. 68, 74.
 Doster v. Brown, 25 Ga. 24, p. 211.
 Dottin's Case, 3 Str. 547, p. 619.
 Doub v. Barnes, 1 Ind. Ch. 127, p. 398.
 Douglass v. Wood, 1 Swan. 393, p. 164.
 Dowell v. Dowell, 3 Head, 502, p. 269.
 Downey v. Garard, 12 Harris, 52, pp. 446, 460, 462.
 Downing v. Major, 2 Dana, 228, pp. 464, 469.
 Downton v. Styles, 6 Dowl. 189, p. 160.
 Doyley v. Roberts, 3 Bing. (N. C.) 836, pp. 244, 245, 246.
 Drain v. Doggett, 41 Iowa, 682, pp. 402, 403.
 Drais v. Hogan, 50 Cal. 121, p. 475.
 Drapers' Co. v. Davis, 2 Atk. 295, pp. 445, 468, 547.
 Drax v. Scroupe, 1 D. P. C. 69; Barn. & Ald. 581, p. 520.
 Drehman v. Stefle, 8 Wall. 597, p. 68.
 Drew v. Rose, 2 Ld. Raym. 1398, pp. 200, 204.
 Driggs v. Rockwell, 11 Wend. 504, p. 294.
 DuBarre v. Levette, Peake, 77, pp. 262, 290, 291.
 Dubois' Appeal, 38 Pa. 231, p. 195.
 Ducett v. Cunningham, 39 Me. 386, p. 374.
 Dudley v. Beck, 3 Wis. 274, pp. 281, 304.
 Duffin v. Smith, Peake, 108, pp. 254, 282, 310, 318.
 Duffy v. Oakes, 3 Taunt. 166, pp. 104, 199.
 Dukes, Ex parte, 2 W. W. & H. 44, p. 94.
 Dumas v. Smith, 17 Ala. 305, p. 593.
 Dunbar v. Morris, 3 Rob. (La.) 278, p. 383.
 Duncan v. Bruthaupt, 1 McCord, 149, pp. 549, 574.
 v. Richmond, 7 Taunt. 391, pp. 171, 617, 621.
 Duncan, In re, 5 Best & Smith, 341, p. 87.
 Duncan v. Yancy, 1 McCord, 149, pp. 558, 568.
 Dundas v. Duttens, 1 Ves. Jr. 196, p. 345.
 Dungey v. Angrove, 2 Ves. & B. 93, p. 179.
 Dunman v. Hartwell, 9 Tex. 495, p. 350.
 Dunn v. Amos, 14 Wis. 106, p. 280.
 Dunn, Ex parte, 6 Ves. 547, p. 545.
 Dunn v. Hallen, 2 Fost. & F. 642, pp. 506, 544.
 v. Packwood, 11 Jur. 242, pp. 52, 257.
 v. Record, 63 Me. 17, pp. 458, 460.
 v. Vannerson, 8 Miss. 579, pp. 512, 513.
 Dunson v. Paterson, 11 Jur. 96; 8 L. T. 313, p. 469.
 Dupeu v. Keeling, 4 Car. & P. 102, pp. 368, 523, 559.
 Duries v. Wright, 8 Com. B. 831; 7 Dowl. & L. 292; 19 Law J. Com. P. 137, p. 542.
 Durkee v. Leland, 4 Vt. 615, pp. 254, 295.
 Dwight v. Simon, 4 La. An. 490, pp. 417, 424, 507, 523.
 Dwyer v. Collins, 7 Ex. 639, pp. 295, 296, 309, 318.

Dyce, In re, Sombre, 1 Macn. & G. 122, p. 444.
 Dyson v. Birch, 4 Bos. & P. 4, p. 200.

E.

Eager v. Barnes, 31 Beav. 579, p. 506.
 Ealer v. McAllister, 19 La. An. 29, p. 565.
 Earl of Cholmondeley's Case, 19 Ves. 261, p. 260.
 Earle v. Grout, 46 Vt. 113, pp. 267, 314.
 Earl of McDonald v. Masterman, 7 Law R. Eq. 504, p. 524.
 Earle, In re, 17 Jur. 440, p. 87.
 Eastman v. Coos Bank, 1 N. H. 26, p. 566.
 East River Bank v. Kennedy, 9 Bosw. 543, pp. 509, 384.
 Easton v. Smith, 1 E. D. Smith 318, pp. 549, 579.
 Eckrote v. Myers, 41 Iowa, 324, p. 460.
 Eccles v. Stephenson, 3 Bibb, 517, pp. 477, 482, 510, 486, 501, 504, 521.
 Edelin v. Richardson, 4 La. An. 503, pp. 574, 576.
 Edgar v. Hunter, Holt, 526, p. 44.
 Edgar Co. v. Mayo, 3 Gill. 82, p. 75.
 Edgerton v. Brackett, 11 N. H. 218, p. 385.
 Edsall v. Brooks, 17 Abb. Pr. 227; 26 How. Pr. 426, p. 217.
 Edward v. Cooper, 3 Car. & P. 277, p. 571.
 Edwards v. Lawless, 5 Rail. C. 357; 6 Dowl. & L. 105; 6 Com. B. 329; 17 Law J. Com. P. 293, p. 540.
 v. Myrick, 12 Law J. Ch. 52; 2 Hare, 60, pp. 457, 465.
 Egan v. Charles Co. Court, 3 Har. & McH. 169, p. 75.
 v. Rooney, 38 How. Pr. 121, pp. 395, 424, 426.
 Eggington v. Cumberleje, 1 Ex. 271; 5 Rail. E. 113; 11 Jur. 932, p. 540.
 Eicke v. Nokes, Moody & M. 303, pp. 291, 296, 299, 306.
 Elam v. Lewis, 19 Ga. 608, p. 201.
 Elderton v. Emmens, 4 Com. B. 479; 11 Jur. 212; 16 Law J. & C. 209; S. C. (in error) 13 Com. B. 495; 4 H. L. Cas. 624; 18 Jur. 21, p. 333.
 Eldridge v. Fobwell, 3 Blackf. 208, p. 354.
 Elkington v. Holland, 9 Mees. & W. 661, p. 483.
 v. Holland, 9 Mees. & W. 650, p. 508.
 Elliott v. McClelland, 17 Ala. 206, pp. 580, 587, 593.
 Ellis, In re, 5 L. T. N. S. 686, p. 96.
 Ellsworth v. Campbell, 31 Barb. 134, pp. 360, 362, 364, 370, 523.
 Elsam, In re, 3 Barn. & C. 597; 5 Dowl. & R. 889, pp. 181, 182, 187.
 Elsee, Ex parte, 1 Montague, 69, p. 50.
 Elston v. Schelling, 7 Robt. 74, p. 485.
 Elton v. Larkins, 1 Moody & R. 196; S. C. 5 Car. & P. 385, p. 378.
 Elwell v. Quash, 1 Strange, 20, p. 327.
 Elwood v. Wilson, 21 Iowa, 523, pp. 572, 610.
 Ely v. Cook, 28 N. Y. 365, p. 627.
 v. Harvey, 6 Bush, 520, pp. 401, 403.
 Emden v. Darby, 1 Nev. Rep. 22, pp. 608, 628.
 Emmens v. Elderton, 13 Com. B. 495; 4 H. L. Cas. 624, p. 343.
 Emmet, In re, 2 Caines, 387, pp. 199, 202, 203.
 Emory v. Long, 9 East, 481; 1 Mylne & K. 98, p. 150.
 Englehart v. Hart, 10 Mees. & W. 548; 4 Dowl. & L. 60; 15 Law J. Ex. 312, p. 542.
 Erwin v. Blake, 8 Peters, 18, pp. 410, 412, 415.
 Esdaille v. Oxenham, 3 Barn. & C. 225; 5 Dowl. & R. 49, pp. 617, 618.
 Eshleman v. Lewis, 49 Pa. 410, p. 457.
 Estcourt, In re, 8 Jur. 985, p. 94.
 Evans, In re, 1 W. W. & H. 34; 2 Jur. 47, pp. 95, 137.
 v. Bell, 6 Dana, 479, p. 580.
 v. Collins, 5 Ad. & E. N. S. 804, p. 242.
 v. Duncombe, 1 Crompt. & J. 372; 1 Tyrw. 283, pp. 136, 138.
 v. Ellis, 5 Denio, 640, pp. 451, 452, 457, 462, 465, 587.
 v. Evans, 5 Denio, 640, p. 468.
 v. Lewis, 1 Law R. Com. P. 656, p. 525.
 v. P. 2 Wils. 282, p. 174.
 v. Taylor, 2 D. P. C. 349, p. 547.
 v. Watrous, 2 Port. 205, p. 184.
 Evingdon's Case, 2 Strange, 1143, p. 198.
 Eyre v. Shelly, 8 Mees. & W. 154; 5 Jur. 439, p. 543.
 Ezart v. Lister, 5 Beav. 585; 12 Law J. Ch. N. S. 10, p. 444.

F.

Fairbanks v. Stanley, 18 Me. 296, pp. 373, 375.
 Fairland v. Eneror, Dick. 114, p. 606.
 Fairthorne, In re, 3 Dowl. & L. 548, pp. 136, 137.
 Faith, Ex parte, 9 D. P. C. 973; 5 Jur. 653, p. 176.
 Faithful, In re, Law. Rep. 6 Eq. 325, p. 615.
 Fake v. Smith, Abb. Pr. 108; 2 Abb. Ct. of Ap. Dec. '76, pp. 394, 404.
 Fare v. Chandler, 24 Tex. 146, p. 568.
 Farquand v. Knight, 2 Mees. & W. 100, 284.
 Farhall v. Farhall, Law Rep. 7 Eq. 286, p. 615.
 Farley v. Hebber, 3 Dowl. 538, pp. 427, 431, 433.

- Farmers' Bank v. Ketchum*, 4 McLean, 120, p. 391.
 v. Sprigg, 11 Md. 389, p. 378.
- Farmers' Co. v. Walworth Co.*, 23 Wis. 249, p. 478.
- Farmers' Loan Co. v. Mann*, 4 Robt. 365, 568, 574.
- Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457, p. 340.
- Farnsworth v. Gerrard*, 1 Comp. 38, p. 506.
- Farrell's Case*, Andrew. 278, p. 182.
- Farrill v. Head*, Barnes, 41, p. 199.
- Farrington v. Wright*, 1 Minn. 241, p. 343.
- Faulkner, Ex parte*, 1 W. Va. 269, p. 63.
- Faust v. Repoor*, 15 How. Pr. 570, pp. 427, 438.
- Farrell v. Eastern etc.* 3 Ex. 344; 2 Dowl. & L. 54, p. 379.
- Fawcett v. Garford*, Trin. 29 Geo. III, p. 181.
 v. Weathall, 2 Car. & P. 305, p. 563.
- Fawkes v. Pratt*, 1 P. Wms. 593, p. 179.
- Fearne v. Wilson*, 6 Barn. & C. 86; 6 Dowl. & R. 157, p. 545.
- Fearow, Ex parte*, 5 Ves. 633, p. 545.
- Fell v. Brown*, Peake, 96, pp. 50, 51, 536.
- Fellows, Ex parte*, 2 Scam. 369, p. 124.
- Fendall v. Nokes*, 7 Scott, 647, p. 230.
- Fenner v. R. R.*, Law R. 7 Q. B. 767, pp. 291, 295.
- Fenno v. English*, 22 Ark. 170, pp. 420, 421, 503, 579, 600.
- Fenton v. Correa*, 3 Car. & P. 45; 1 Ryan & M. 262, p. 345.
- Fenton, In re*, 5 Nev. & M. 239; 3 Ad. & E. 404; 1 Har. & M. 310, pp. 133, 175.
- Fenton v. Ruggles*, 1 Bos. & P. 365, p. 219.
- Fenwick v. Reed*, 1 Mer. 114, pp. 620, 241.
- Ferguson v. Crawford*, 7 Hun, 25, p. 343.
- Ferguson, In the matter of*, 6 Cow. 569, pp. 184, 150.
- Ferguson v. Mahon*, 11 Ad. & E. 179, p. 356.
- Field v. Gibbs*, Pet. C. C. 155, pp. 229, 236, 223, 352, 355.
 v. Proprietors, 1 Cush. 11, p. 343.
 v. Watson, 8 Mo. 686, p. 485.
- Fijes v. Adams*, 4 Taunt. 632, p. 608.
- Filby v. Miller*, 25 Pa. 264, p. 397.
- Finchett v. How*, 2 Camp. 276, p. 331.
- Finnick v. Bovee*, 4 Thomp. & C. 98, 628.
- Fish v. Kelly*, 17 Com. B. N. S. 194, 196, p. 622.
- Fisher, Ex parte*, 9 Price, 349, pp. 147, 156.
- Fisher v. Fielding*, 1 Price, 384, p. 203.
 v. Henning, 1 Ph. Ev. 170, pp. 295, 298.
- Fitch v. Gardner*, 2 Keyes, 516, pp. 597, 627.
 v. Scott, 3 How. (Miss.) 314, pp. 476, 485, 491, 493.
- Flanders v. Sherman*, 18 Wis. 575, pp. 425, 426.
- Fleming v. Culbert*, 46 Pa. 498, p. 510.
- Fletcher v. Daingerfield*, 20 Cal. 430, pp. 66, 141, 142, 149, 156, 158.
 v. Peck, 6 Cranch. 87, p. 69.
 v. State, 49 Ind. 124, p. 212.
 v. Winter, 3 Fost. & F. 138, pp. 505, 556.
- Flight v. Cook*, 1 Dowl. & L. 174; 13 Law J. Q. B. 78, p. 201.
 v. Leman, 4 Q. B. 883; 12 Law J. Q. B. 353, pp. 562, 589.
- Flint, Ex parte*, 2 Dowl. & R. 406, p. 183.
- Flint v. Pike*, 4 Barn. & C. 478, pp. 47, 51, 209.
- Florida v. Kirke*, 12 Fla. 278, pp. 141, 142.
- Flower v. Bolingbroke*, 1 Str. 639, pp. 476, 493, 498.
 v. O'Connor, 7 Lea. 207, p. 598.
- Floyd and Barker's Case*, 12 Coke, 25, p. 143.
 v. Goodwin, 8 Yerg. 484, p. 580.
 v. Nagle, 2 Atk. 568, pp. 468, 487, 507.
 v. Tompkins, 23 Ind. 348, p. 370.
- Fogerty v. Jordan*, 2 Robt. 319, 325, pp. 514, 580, 627.
- Fogg v. Madan*, 1 Bos. & P. 629, p. 205.
- Foley, Ex parte*, 8 Ves. 33, p. 166.
- Follansbee v. Walker*, 72 Pa. 228, pp. 226, 227.
- Follett, In re*, 30 Beav. 629, p. 91.
- Follett v. Jeffery*, 1 Sim. N. S. 17, pp. 307, 317.
- Foot v. Brown*, 8 Johns. 64, p. 248.
 v. Tewksbury, 2 Vt. 97, pp. 625, 611.
- Foot v. Richmond*, 42 Cal. 439, p. 358.
- Ford v. Harrington*, 16 N. Y. 285, 288, pp. 452, 457, 461, 465, 587.
- Ford, In re*, 8 D. P. C. 684, p. 176.
- Ford v. Webb*, 2 Brod. & B. 241, p. 548.
 v. Williams, 3 Kern. 377, p. 495.
 v. Williams, 24 N. Y. 359, p. 240.
- Foreman v. Hunt*, 3 Dana, 614, p. 459.
- Forshall v. Coles*, Peake Ad. Cas. 286, p. 450.
- Forsham, In re*, 17 Law J. Ch. 61, p. 417.
- Forshaw, In re*, 16 Sim. 161, p. 629.
- Forsythe v. Beveridge*, 52 Ill. 268, p. 628.
- Fortescue, Ex parte*, 2 Holt, 1; 1 Vent. 213, p. 151.
- Fosset v. Middleton*, 47 Pa. 214, p. 374.
- Foster v. Blakelock*, 5 Barn. & C. 228; 8 Dowl. & R. 48, pp. 231, 236.
 v. Gansey, 13 Johns. 465, p. 201.
- Foster, In re*, 6 Jur. N. S. 687, p. 546.
- Foster v. Jack*, 4 Watts, 344, pp. 548, 549, 556, 558, 567, 587.
 v. Rowland, 7 Jur. N. S. 998, p. 377.
 v. Wiley, 27 Mich. 244; S. C. 15 Am. R. 185, pp. 375, 243, 386.

- Fotts v. Dutton*, 8 Beav. 493, pp. 492, 528.
Fountain v. Young, 3 Esp. 113, pp. 262, 290.
Fowler v. Hunt, 10 Johns. 463; 4 Wend. 204; 1 *Ibid.* 32; 4 Call. 97; 9 Wend. 503; p. 119.
Fowler v. Morrill, 8 Tex. 153, pp. 338, 347, 377.
 v. Roe, 4 Dowl. & L. 639, p. 418.
Fox v. Cooper, 2 Q. B. 237, p. 445.
 v. Fox, 24 How. Pr. 409, p. 623.
Foxall v. Bowerman, 2 East, 182, p. 219.
Foxon v. Gascoigne, Law Rep. 9 Ch. 645, pp. 611, 615.
Francis v. Webb, 7 Com. B. 731, pp. 625, 630.
Frankerd, Ex parte, 3 Barn. & Ald. 257, p. 92.
Frankland v. Cole, 2 Crompt. & J. 590, pp. 491, 494.
Frankland v. Lucore, 4 Sim. 586, pp. 486, 488.
Franklin v. Cothouse, 3 Swanst. 301, p. 447.
Fraser's Case, 1 Burr. 291, pp. 85, 86.
Fray v. Blackburn, 3 Best. & Smith, 576, p. 170.
 v. Foster, 1 Bing. F. 681, p. 489.
 v. Voulter, 1 El. & E. 839, pp. 395, 396.
Frear v. Drinker, 8 Pa. 520, p. 228.
Freehold Co. In re, 21 Law J. N. S. 195, p. 609.
Freelove v. Cole, 41 Barb. 318, p. 478.
Freligh v. Ames, 31 Mo. 253, p. 215.
Friswell v. Haile, 18 Mo. 18, p. 610.
Friswell v. King, 15 Sim. 191, pp. 607, 614, 616, 617.
Frost, Ex parte, 3 D. P. C. 322, pp. 87, 147, 152.
Frost v. Lawler, 34 Mich. 235, p. 367.
Frye v. Calhoun Co., 14 Ill. 132, pp. 347, 351.
Fryer, Ex parte, 2 Har. & W. 294, p. 137.
Fryer v. Smith, 6 Dowl. 299, p. 160.
Fulcher, Ex parte, 4 Jur. 435, p. 95.
Fullalove v. Parker, Com. B. N. S. 246, p. 98.
Fuller v. Brown, 10 La. An. 350, p. 429.
Fulton v. Maccracken, 18 Md. 528, p. 277.
Furlong v. Howard, 3 Schoales & L. 115, p. 620.
- G.**
- Gaillard v. Smart*, 6 Cowen, 385, pp. 374, 378, 379, 386, 406, 407, 476, 485.
Gaines, Ex parte, 3 Hurl. & C. 294, p. 638.
Gainsford v. Grammar, 2 Camp. 9, pp. 263, 264, 317, 378, 390, 393, 406.
Gages' Case, Hob. 177, p. 204.
Galbraith v. Elder, 8 Watts, 81, pp. 223, 442, 462, 466.
Gallagher v. Thompson, Wright, 466, p. 460.
 v. Williamson, 23 Cal. 331, p. 278.
Gambert v. Hart, 44 Cal. 542, pp. 483, 485, 487, 494.
Gander v. Slausfield, 4 De Gex & J. 1, p. 288.
Garbutt, In re, 9 Moore, 157; 2 Bing. 74, pp. 100, 224.
Gardner, Ex parte, 2 Dowl. O. S. 520, p. 139.
 Ex parte, 8 L. T. N. S. 315, pp. 88, 91.
Gardner v. Ennor, 35 Beav. 549, p. 464.
 v. Jessup, 2 Wils. 44, pp. 197, 199.
Garland v. Scott, 3 Sim. 396, p. 269.
Garden v. Sheers, Ca. Pr. C. P. 60-102, p. 199.
Gardner v. Taylor, 5 Abb. Pr. N. S. 33; S. C. 36 How. Pr. 63, pp. 428, 429, 430.
 v. Tyler, 5 Abb. Pr. N. S. 33, p. 605.
Garfield v. Kirk, 65 Barb. 464, p. 564.
Garland, Ex parte, 4 Wall. 380, pp. 64, 66, 68, 69, 71, 142.
Garner v. Lawson, 1 Barn. 101, pp. 486, 487.
Garr v. Mairret, 1 Hilt. 498, p. 574.
 v. Seldon, 4 N. Y. 91, pp. 207, 216, 248.
Garrison v. McGowan, 48 Cal. 592, p. 371.
Garterside v. Outram, 26 Law J. Com. P. pp. 113, 114, 308.
Garry v. Wilks, 2 Dowl. O. S. 649, pp. 136, 138.
Garthwaite v. Wentz, 19 La. An. 196, p. 411.
Garvin v. Lowry, 15 Miss. (7 Smed. & M.) 24, p. 380.
Gascoyne's Case, 14 Ves. 183, pp. 199, 200.
Gaulden v. Georgia, 11 Ga. 47, p. 221.
Gauldin v. State, 11 Ga. 47, p. 454.
Gay v. Capers, 1 Const. 198, p. 558.
Gedye, In re, 14 Beav. 56; 15 Jur. 851, p. 539.
Gee, In re, 2 Dowl. & L. 997, pp. 136, 137.
Gehrke v. Jod, 59 Mo. 522, pp. 155, 485.
Gemmell v. McAllister, 6 Jur. N. S. 285; 11 Week. R. 486; 7 L. T. N. S. 841, p. 467.
George v. Elston, 1 Scott, 518; 1 Hodges, 63, p. 625.
Georges v. Georges, 18 Wis. 244, p. 618.
Gerrard's Case, 2 W. Black. 1125; 2 Ves. 201, pp. 197, 198.
Gerry v. Fisher, 6 East, 549, p. 429.
Getchell v. Clark, 5 Mass. 309, pp. 610, 611.
Gibbs v. Loomis, 10 Johns. 463, p. 200.
Gibbert v. The People, 1 Denio. 41, pp. 206, 207.
Giberson, Ex parte, 4 Cranch C. C. 503, p. 483.

- Gibbons *v.* Gibbons, 4 Har. (Del.) 105, p. 438.
- Gibson *v.* Chaters, 1 Bos. & P. 129, p. 240.
- v.* Jeyes, 6 Ves. 266, 278, pp. 452, 459, 465, 467.
- v.* Jeyes, 6 Ves. 266, p. 135.
- v.* May, 4 De Gex M. & G. 512, p. 614.
- v.* Mudford, 1 Roll. Rep. 408, pp. 237, 240.
- Giddings *v.* Eastman, 5 Paige, 561, pp. 460, 462.
- Gifford *v.* Gifford, Forrest, 109, pp. 628, 630.
- v.* Thorn, 1 Stock Ch. 702, pp. 351, 364, 722.
- Gihon *v.* Albert, 7 Paige, 62, 278, p. 509.
- Gilbank *v.* Stephenson, 30 Wis. 155, p. 218.
- Gilbeson *v.* Snyder, 8 Watts & S. 200, pp. 388, 391.
- Gilbert *v.* Cooper, 15 Sim. 343, p. 137.
- v.* Dynely, 3 Scott N. R. 384; S. C. 3 Man. & G. 12, pp. 483, 562.
- v.* Ross, 7 Mees. & W. 112; 8 Dowl. Pr. 389; 4 Jur. 321, p. 298.
- v.* Williams, 8 Mass. 57, pp. 50, 472, 493, 483, 491, 509.
- Gill *v.* Lougher, 1 Cromp. & J. 170, pp. 497, 509.
- Gillard *v.* Bates, 6 Mees. & W. 547; 8 D. P. C. 744, pp. 258, 284.
- Gillespie's Case, 3 Yerg. 325, pp. 349, 344, 371.
- Gillon *v.* Ryder, 15 Com. B. 729; 3 C. L. R. 263, p. 547.
- Gilman *v.* Horey, 26 Mo. 280, pp. 496, 518.
- v.* Lewis, 4 Zab. 248, p. 350.
- Gilmour *v.* Brindley, 7 Dowl. & R. 259, p. 427.
- Gimers *v.* Moore, 1 Barn. & C. 654, pp. 431, 432, 433.
- Gimlet, Ex parte, 11 Week. R. 210, p. 96.
- Gindirs *v.* Moore, 1 Barn. & C. 564, p. 429.
- Givens *v.* Briscoe, 3 J. J. Marsh. 532, p. 509.
- v.* Briscoe, 3 J. J. Marsh. 534, pp. 380, 383, 401, 411, 412, 414.
- Given *v.* Driggs, 3 Caines, 150, p. 426.
- Glaister *v.* Haser, 8 T. R. 70, 465, pp. 626, 608.
- Gleason *v.* Clark, 9 Cow. 57, pp. 480, 483, 486, 491, 521, 556, 563, 591.
- v.* Dodd, 4 Met. 333, pp. 335, 356, 426, 438, 357.
- Glen *v.* Cuttle, 1 Grant, 273, pp. 510, 513, 514, 515.
- Glyn *v.* Caulfield, 3 Macn. & G. 433, p. 289.
- v.* Hutchinson, 2 Ad. & E. 660, p. 100.
- Glynn *v.* Hutchinson, 3 Dowl. 529, p. 82.
- Gobbitt *v.* Chaytor, 1 Aust. 279, p. 628.
- Goddard *v.* Gardiner, 28 Conn. 172, pp. 291, 303, 318.
- Godfroy *v.* Dalton, 6 Bing. 467, 568; 4 Moore & P. 149, pp. 483, 484, 473, 475, 497, 507, 527.
- Godefroy *v.* Jay, 7 Bing. 413; 5 Moore & P. 213, pp. 476, 477, 481, 489, 491, 492, 497, 500, 527.
- Godspeed *v.* Fuller, 46 Me. 141, p. 163.
- Goldie *v.* Shuttlesworth, 1 Camp. 70, p. 391.
- Goldthwaite *v.* Council, 50 Ala. 486, p. 79.
- Goltra *v.* Walcott, 14 Ill. 89, p. 285.
- Gonnigal *v.* Smith, 6 Johns. 106, p. 436.
- Goodall *v.* Bedell, 20 N. H. 205, pp. 565, 566.
- v.* Little, 1 Sim. N. S. 135, pp. 289, 297.
- Goodell, In re, 39 Wis. 232, p. 79.
- Goodenough *v.* Spencer, 15 Abb. Pr. N. S. 248, p. 453.
- Goodell *v.* People, 5 Parker Cr. C. 206, p. 221.
- Goodland *v.* Frankland, 2 Dowl. N. S. 975; 7 Jur. 671; 12 Law J. Q. B. 249, p. 547.
- Goodlight *v.* Bridge, Lofft, 27; 7 Johns. Ch. 25; 2 Cowen, 195, p. 321.
- Goodman *v.* Holroyd, 13 Com. B. N. S. 839, p. 308.
- v.* Walker, 30 Ala. N. S. 482; S. C. 21 Ala. N. S. 642, pp. 483, 494, 495, 496.
- v.* Walker, 30 Ala. 482, 842, pp. 473, 484.
- Goodrich, In re, 79 Ill. 148, pp. 140, 151.
- Goodrich *v.* Jones, 2 Curt. 671, p. 303.
- v.* Railroad, 38 Ibid. 390, p. 379.
- Goodwin *v.* Gibbons, 4 Burr. 2108, pp. 238, 241.
- v.* Gosnell, 2 Colly. C. C. 457, pp. 147, 449.
- Gordon *v.* Miller, 14 Ind. 204, p. 568.
- Gore *v.* Bowser, 5 De Gex & S. 30, p. 308.
- v.* Brazier, 3 Mass. 543, p. 493.
- v.* Harris, 8 Eng. L. & Eq. 147, p. 311.
- Gorham *v.* Gale, 7 Cowen, 739, pp. 383, 387, 406, 410, 412, 415, 424.
- Goring *v.* Bishop, 1 Salk. 87, pp. 172, 619.
- Goss *v.* Gibbs, Law R. 8 Eq. 522, p. 288.
- Gould *v.* Davis, 1 Cromp. & J. 415; 1 Tyrw. 380, p. 630.
- Governor *v.* Raley, 34 Ga. 173, p. 527.
- Gower *v.* Emery, 18 Me. 79, pp. 275, 277, 281.
- Grace *v.* Wilmer, 6 El. & B. 982; 3 Jur. N. S. 64; 26 Law J. Q. B. 1, p. 204.
- Graham *v.* O'Fallon, 4 Mo. 338, pp. 281, 304.
- v.* People, 63 Barb. 468, pp. 258, 296, 307.

- Granger v. Warrington, 8 Ill. 299, p. 284.
 Grant, Ex parte, 3 Dowl. 320, pp. 153, 155.
 Ex parte, 3 Dowl. 320, p. 184.
 Grant v. White, 6 Cal. 55, pp. 429, 430.
 Gray, Ex parte, 5 Jur. 25, p. 167.
 Gray v. Cockerel, 2 Atk. 144, 307; S. C. 3 Atk. 727, p. 622.
 v. Emmons, 7 Mich. 533, pp. 441, 450, 485, 587.
 v. Fox, 43 Mo. 570, p. 268.
 v. Gower, 2 Marsh. 273, pp. 562, 589.
 v. Wainman, 7 Moore, 467, p. 563.
 v. Wass, 1 Greenl. 257, pp. 373, 423, 425, 426.
 Graves v. Eades, 1 Marsh. 113; 5 Taunt. 429, pp. 623, 625.
 v. Lockwood, 30 Conn. 276, pp. 565, 567.
 Grayson v. Wilkinson, 5 Smedes & M. 268, pp. 483, 486, 494, 497, 513, 529.
 Greaves, Ex parte, 1 Crompt. & J. 374, pp. 136, 138.
 Green v. Dixon, 1 Jur. 137, pp. 44, 449, 477, 508.
 v. Chipman, 23 Ind. 195, p. 513.
 v. Exp. Co. 39 Ga. 20, p. 625.
 v. Hassell, Say. 233, p. 545.
 v. Jackson, Peake's Ad. Cas. 286, pp. 249, 450, 499.
 v. Elgie, 5 Q. B. 114, pp. 237, 241, 242.
 Greene v. Reece, 8 Com. B. 88, p. 98.
 Greenlee v. McDowell, 4 Ired. 481, pp. 373, 375, 386.
 Greensil v. Hopley, 1 Bos. & P. 103, p. 219.
 Greenville v. Roberts, 7 La. 66, p. 411.
 Greenough v. Gaskell, 1 Mylne & K. 98, pp. 254, 256, 257, 258, 259, 262, 264, 284, 306, 317, 516.
 Gregg v. Slater, 22 Beav. 314; 2 Jur. N. S. 246; 25 Law J. Ch. 440, p. 331.
 Gregory, In re, 6 Jur. 282, p. 172.
 Gregory v. Cresswell, 1 Holt, 17, p. 617.
 Grell v. Levy, 16 Com. B. N. S. 73; 10 Jur. N. S. 210, p. 588.
 Gresley v. Mousley, 2 Kay & J. 288; 2 Jur. N. S. 156, p. 290.
 Grey, Ex parte, 5 Dowl. & L. 275, p. 98.
 Grey v. Brackenridge, 2 Pa. 175, pp. 548, 549, 553.
 Greydon v. Patterson, 13 Iowa, 256, pp. 402, 403.
 Greville, In re, 9 Law R. Com. P. 13, p. 89.
 Gridley v. Austin, 16 Q. B. 504; 13 Jur. 680; 18 Law J. Q. B. 337, p. 540.
 Griffen v. Eyles, 1 H. Black. 122, p. 605.
 Griffith v. Brown, Ca. Pr. C. P. 64, p. 199.
 v. Davis, 5 B. & A. 503, p. 311.
 v. Williams, 1 Crompt. & J. 47, p. 406.
 Griffiths v. Griffiths, 12 Law J. N. S. 397; 2 Hare, 587, p. 416.
 v. Griffiths, 2 Hare, 590, p. 624.
 Grillen v. Leyburne, 1 T. R. 407, p. 548.
 Grissell v. Peto, 9 Bing. 1, pp. 436, 455, 517.
 Grissell v. Peto, 2 M. & S. 586, p. 429.
 v. Robinson, 3 Barn. & C. 10, pp. 556, 559.
 Grinstead v. Grinstead, 1 Turn. & Ven. P. Ch. 308, p. 231.
 Griswold v. Sedgwick, 6 Cowen, 462, p. 238.
 Groom v. Wortham, 2 Dowl. N. S. 657, p. 204.
 Grosvenor v. Danforth, 16 Mass. 74, p. 374.
 Grubb, Ex parte, 5 Taunt. 206, pp. 173, 620.
 Gruen v. White, 4 Taunt. 881, pp. 180, 184.
 Guest v. Smythe, 5 Law R. Ch. 551, p. 461.
 Gude, Ex parte, 1 Dowl. & L. 675, p. 98.
 Guilford v. Sims, 13 Com. B. 370, p. 154.
 Gullet v. Lewis, 3 Stewt. 23, p. 380.
 Gutaris, Ex parte, 7 Jur. 1039, p. 74.
 Gwellian v. Barnet, 2 Smith, 155, p. 174.
 Gwynne, Ex parte, 2 W. W. & H. 95, p. 94.

H.

- Hadley v. Ayres, 12 Abb. Pr. N. S. 240, p. 554.
 v. Bainbridge, 3 Q. B. 316, p. 416.
 v. Good, 24 Tex. 232, p. 415.
 Haden, Ex parte, 1 W. W. & H. 321, p. 91.
 Haggot v. Argent, 7 Taunt. 472, p. 433.
 Hager v. Shindler, 29 Cal. 47, p. 276.
 Hague, Ex parte, 3 Brod. & B. 257, p. 153.
 Haigh v. Jones, 1 Dowl. & L. 81; 6 Scott N. R. 695; 5 M. & G. 634, p. 179.
 Haines v. Galbraith, 43 Ind. 309, p. 327.
 Hall v. Ayer, 9 Abb. Pr. 220, p. 623.
 Hall v. Ashurst, 3 Myers, 420, pp. 136, 231.
 v. Bennett, 2 Sim. & St. 78, pp. 178, 179.
 Hall, Ex parte, Cowie, 7 Moore, 437, p. 174.
 Hall v. Gird, 7 Hill, 586, p. 223.
 v. Lover, 1 Hare, 571, p. 608.
 v. Ody, 2 Bos. & P. 28, pp. 628, 608.
 v. Renfro, 3 Met. (Ky.) 51, p. 228.
 v. Wood, 9 Gray, 60, p. 579.
 v. Washington Co., 2 Greene, 473; 1 Mann. (Mich.) 461, p. 558.
 v. Williams, 6 Pick. 232, p. 356.
 v. Hallett, 1 Cox, 134; 2 Inst. 208; pp. 459, 460.
 Hall, In re, 2 Jur. N. S. 1233, p. 162.
 Haller v. Worman, 9 Week. R. 348, p. 53.
 Hallett v. Oakes, 1 Curt. 196, pp. 549, 557.
 Halliday v. Lawes, 4 Scott, 475, 3 Hodges, 130, p. 626.

- Hallowell's Case, 3 Dall. 460, pp. 54, 81.
Halloway v. Lawe, 7 Port. 488, pp. 580, 590.
Hamilton v. Incledon, 4 Brown Parl. C. p. 619.
v. Mott, Law R. 16 Eq. 112, pp. 288, 315.
v. People, 29 Mich. 183, p. 315.
v. Wright, 37 N. Y. 502, pp. 343, 346, 355.
Hamlin v. McCahil, Clarke Ch. 249, p. 360.
Hammond v. Thorpe, 1 Cromp. M. & R. 64, pp. 345, 361, 368, 140.
Hamsher v. Kline, 57 Pa. 397, p. 457.
Hancock, Ex parte, 2 Dowl. N. S. 54, pp. 91, 94.
Hancock v. Pico, 47 Cal. 160, pp. 579.
Handeley v. Statelord, 6 Litt. 186, pp. 345, 370, 371.
Handridge v. De La Crouse, 10 Jur. 1096; 8 L. T. 163; 16 Law J. Com. P. 85; 3 C. B. Rep. 742, pp. 328, 363.
Handy v. Collett, 7 D. P. C. C. 599, 3 Jur. 870; 2 W. W. & H. 63, p. 431.
Hanlon v. Murray, 12 I. R. C. L. 161, 519.
Hanson v. Harrison, 2 Esp. 555, pp. 44.
v. Hoitt, 14 N. H. 56, pp. 379, 381, 391.
v. Reece, 3 Jur. N. S. 1204, p. 614.
Harbin v. Darby, 28 Beav. 325; 6 Jur. N. S. 906; 29 Law J. Ch. 622; 8 Week. R. 512, p. 464.
Hardenbergh v. Thompson, 1 Johns. 61, p. 436.
Harding v. Burkess, 6 March, 228, p. 82.
Hardwick v. Chandless, 2 Strange, 1138, p. 243.
Hardy v. Keeler, 56 Ill. 152, pp. 244.
Hare, Ex parte, 3 Dowl. 600, p. 160.
Haring v. Cloberry, 1 Phila. 91, pp. 261, 315.
Harkness v. Farley, 11 Me. 491, p. 234.
Harndorn, In re, 9 Dowl. 970, p. 148.
Harnur v. Watson, 8 Greenl. 286, p. 235.
Harper v. Harvey, 4 W. Va. 539, pp. 402, 403.
v. Williams, 4 Q. B. 219, p. 137.
Harland v. Lilienthal, 53 N. Y. 438, pp. 556, 560, 564.
Harris, Ex parte, 11 Week. R. 36, p. 91.
Harris v. Galbraith, 43 Ill. 309, pp. 343, 359.
v. Hardeman, 14 How. 334, p. 356.
v. Holler, 12 Law J. Q. B. 62, p. 171.
v. Hill, Dowl. & R. N. P. C. 17; 3 Stock. 173, p. 298.
v. Osborn, Cromp. & M. 624, pp. 335, 415, 437, 560, 491.
v. Tremenhere, 2 Schoales & L. 474; 15 Ves. 42, pp. 459, 467.
v. Rees, 16 Week. R. 91, p. 456.
Harris In re, 1 Dowl. & L. 1018; 13 Mees. & W. 3; 8 Jur. 453; 13 Law J. Ex. 259, p. 546.
Harrison, In re, 10 Beav. 57; 11 Jur. 197, p. 546.
Harrison v. Turner, 10 Q. B. 482; 11 Jur. 817; 16 Law J. Q. B. 295, p. 541.
v. Bainbridge, 4 Dowl. & R. 363; 2 Barn. & C. 800, p. 628.
v. Ward, 4 D. P. C. 39; 1 Har. & W. 353, p. 544.
v. Jackson, 7 T. R. 207, p. 328.
Harrington v. Edwards, 17 Wis. 586, p. 81.
v. Binns, 3 Fost. & F. 492, pp. 477, 489, 498.
v. Page, 2 Dowl. O. S. 164, p. 202.
v. Jennings's Loft, 188, pp. 183, 184.
Harrow v. Farrow, 7 B. Mon. 126, p. 914.
Harper v. Tahomden, 1 Chit. 714, p. 219.
Harshey v. Blackmarr, 20 Iowa, 172, pp. 338, 356, 359, 360, 363.
Harper v. Perry, 28 Iowa, 57, pp. 458, 465.
Hart v. Chapman, 2 Aik. 162, p. 625.
v. Frame, 6 Clark & F. 193; S. C. 3 Lond. Jur. 550, pp. 474, 475, 483, 484, 496, 527, 450.
v. Spalding, 1 Cal. 213, p. 379.
Hartwell v. Hemmenway, 7 Pick. 117, p. 234.
Harter v. Morris, 18 Ohio, 492, pp. 482, 483, 492, 506.
Hartley v. Hitchcock, 1 Starkes Nisi Prius Rep. 801; 8 Taunt. 149, p. 623.
Harvey v. Clayton, 2 Swanst. 221, pp. 257, 250.
v. Mount, 8 Beav. 439, pp. 44, 517.
v. State, 40 Ind. 516, p. 214.
Hasleham v. Young, 8 Jur. 338, Dav. & M. 700; 5 Q. B. 833, p. 381.
Hastings v. Halleck, 13 Cal. 203, pp. 483, 497, 501, 498.
v. Lusk, 22 Wend. 410, p. 207.
Hatch v. Lewis, 4 Fost. & F. 407, pp. 483, 506.
v. Fogerty, 40 How. Pr. 92; S. C. 10 Abb. Pr. N. S. 147, pp. 456, 460.
Hawden, Ex parte, 5 Jur. 508, p. 100.
Hawkes v. Cottrell, 3 Harl. & N. 243, pp. 333, 560.
Hawkins v. Edwards, 4 Moore, 603, p. 99.
v. Harwood, 4 Ex. 503; 7 Dowl. & L. 181, pp. 489, 394, 258, 311.
v. Lawless, 39 Ga. 5, p. 625.
Hawley v. Cramer, 4 Cowen, 917, pp. 462, 465, 456.
Haydon v. Udjun, Cro. Jac. 521, p. 99.

- Hayes v. Shattuck, 21 Cal. 51, pp. 327, 343, 347.
 Haymes v. Cooper, 10 Jur. N. S. 303; 33 Law J. Ch. 488, p. 612.
 Hayne v. Rhodes, 8 Q. B. 342, pp. 477, 493.
 Haynes v. Rhodes, 8 Q. B. 342, pp. 508, 518, 519, 520.
 Hayward, In re, 11 Week. R. 67, pp. 44, 87, 96.
 Hayward v. Fiott, 8 Car. & P. 59, pp. 556, 559.
 Hazard v. Lane, 3 Mer. 285, p. 545.
 Hazelrigg v. Brenton, 2 Dowl. 525, pp. 229, 510.
 Hazleham v. Young, 5 Q. B. 833; 1 Dav. & M. 700, p. 416.
 Hazlett v. Gill, 5 Robt. 611, p. 438.
 Heacht v. Chipman, 2 Aik. 162, p. 308.
 Headley v. Good, 24 Tex. 232, p. 504.
 Heath v. Cremlock, Law R. 15 Eq. 257, p. 312.
 Heaton v. Faithful, 12 Pa. 304, pp. 318, 319.
 Heaton's Case, 2 Barnes, 33, p. 308.
 Heard v. Lodge, 20 Pick. 33, p. 373.
 Hefferman v. Burt, 7 Iowa, 321, p. 355.
 Heister v. Davis, 3 Yates, 4, pp. 277, 307, 516.
 Held v. Jervais Walker, Mich. 431, p. 374.
 Hellman v. Wheeny, 3 Rich (S. C.) 364, p. 343.
 Hemenway v. Smith, 28 Vt. 701, p. 292.
 Hench v. Todhunter, 7 Har. & J. 275, pp. 327, 329, 343, 347, 368, 369.
 Henderson v. Haines, 5 How. 525, p. 367.
 Hening, Ex parte, 2 Dowl. N. S. 54, pp. 91, 94.
 Henly v. Bainbridge, 3 Q. B. 316; 2 Gale & D. 433, p. 381.
 Henchey v. Chicago, 44 Ill. 136, pp. 611, 625.
 Hennen v. Bourgeat, 12 Rob. La. 522, p. 577.
 Henry v. Rainman, 25 Pa. 354, pp. 221, 223, 442, 455, 466.
 v. Snyder, In re, 40 N. Y. 560, p. 81.
 Henry, Ex parte, 1 Perry & D. 71, p. 95.
 Henry Clay v. Ballard, 9 Rob. (La.) 308, p. 595.
 Heold v. Hall, 2 Dowl. P. C. 160, p. 543.
 Herbert v. Alexander, 2 Call, 498, pp. 383, 388.
 Herron v. Bullitt, 3 Sneed, 497, p. 421.
 v. Farrow's Heirs, 7 B. Mon. 126, p. 411.
 Hern v. Cutley, 30 How. Pr. 208; S. C. 1 Daly, 512, p. 220.
 Herrick v. Catley, 1 Daly, 512; 30 How. Pr. 208, pp. 454, 469.
 v. Howard, 1 W. Black. 231, p. 205.
 Herring v. Cloberry, 1 Turn. & Phil. 915, pp. 255, 256.
 Hess v. Cole, 23 N. J. L. 3 Zab. 116, 345, 357.
 Hess v. Voss, 52 Ill. 472, p. 459.
 v. Joseph, 7 Rob. (N. Y.) 609, p. 511.
 Heslop v. Metcalf, 3 Mylne & C. 183, pp. 491, 522, 617, 624.
 Hewison v. Guthrie, 2 Bing. (N. C.) 000, p. 621.
 Heyfron, Ex parte, 7 How. (Miss.) 127, pp. 69, 142, 156.
 Hibberd v. Knight, 17 Law J. Ex. 191, p. 299.
 Hickman v. Hickman, 8 D. P. C. 833; 1 Man. & G. 566, pp. 173, 183.
 Hicks v. Chouteau, 12 Mo. 342, p. 235.
 v. Morant, 3 Young & J. 286; 2 Dowl. & C. 414, pp. 446, 448.
 Higbee v. Dresser, 103 Mass. 523, p. 271.
 Higgs' Case, Ex parte, 1 Dowl. 495, p. 157.
 Higgs v. Taylor, 1 Car. & K. 85, p. 311.
 Higgens v. Joyce, 2 Jones & L. 000, p. 246.
 v. Scott, 2 Barn. & Ad. 413, p. 614.
 Hill v. Allen, 2 Mees. & W. 283, pp. 562, 571.
 v. Barney, 18 N. H. 607, p. 473.
 v. Brinkley, 10 Ind. 102, p. 610.
 Hill, Ex parte, 7 T. R. 456, pp. 87, 89, 116, 136, 151, 152.
 Hill v. Featherstonhaugh, 7 Bing. 509; 5 Moore & P. 541, pp. 504, 506, 557, 571.
 v. Fletcher, 5 Ex. 470, p. 137.
 v. Humphreys, 2 Bos. & P. 343; 3 Esp. 254, pp. 541, 543.
 v. Mendenhall, 21 Wall. 453, pp. 347, 350.
 v. Mills, 2 Dowl. 696, p. 99.
 v. Roe, 2 Marsh. 257; 6 Taunt. 231, p. 432.
 v. Ross, 3 Dall. 331, pp. 338, 340.
 Hildreth v. Harney, 3 Johns. Cas. 300, pp. 427, 429.
 Hilleary v. Hungate, 3 Dowl. 62, pp. 82, 100.
 Hilliard v. Carr, 6 Ala. 557, p. 328.
 Hilliard, In re, 6 Dowl. & L. 919, pp. 136, 138.
 Hillier v. James, 1 Barnes, 37, p. 545.
 Hillings v. Jones, 3 Bing. 70, pp. 322, 329.
 Hindman v. Macall, 3 Greene, 170, p. 356.
 Hinkley v. Company, 9 Minn. 55, p. 425.
 v. Falls, 9 Minn. 55, pp. 425, 426.
 Hipposley, In re, 1 H. Black. 636, p. 32.
 Hirshfield v. Landman, 3 E. D. Smith, 208, pp. 327, 345, 352.
 Hirst v. Ingersoll, 9 Phila. 216, p. 181.
 v. Tolson, 2 Macn. & G. 134, p. 94.
 Hitchcock v. McGee, 7 Port. 556, pp. 557, 419, 420.
 Hoad v. Ware, 34 Ga. 328, pp. 565, 566, 567.
 Hoare v. Silverlock, 9 Com. B. 22, p. 217.

- Hoar *v.* Wood, 3 Met. 197, pp. 207, 216.
 Hobby *v.* Smith, 1 Cowen, 588, p. 81.
 Hobson *v.* Watson, 34 Me. 20, p. 611.
 Hoby *v.* Built, 3 Barn. & Adol. 350, pp. 487, 491, 494, 521, 525, 526, 527, 560.
 Hockenbury *v.* Carlisle, 5 Watts & S. 348, p. 462.
 Hodges, *Ex parte*, 1 Jur. 933, p. 160.
 Hodges *v.* Litchfield, 1 Bing. N. C. 499, p. 450.
 Hodgson *v.* Scarlett, 1 Barn. & Ald. 238, pp. 47, 51, 52, 207, 216.
 Hodson *v.* Gerrall, 2 D. P. C. 264, pp. 175, 178.
 Hoffenberth *v.* Muller, 12 Abb. Pr. N. S. 222, p. 379.
 Hofferman *v.* Burt, 7 Iowa, 320, p. 377.
 Hoffman *v.* Hoffman, 46 N. Y. 30, p. 353.
 v. Riley, 13 Abb. Pr. 399, p. 430.
 v. Rowley, 13 Abb. Pr. 398, p. 218.
 v. Smith, 1 Caines, 157, pp. 285, 292, 516.
 v. Stone, 31 Tex. 595, p. 356.
 v. Van Nostrand, 14 Abb. 331, pp. 428, 429, 430.
 Hoffmire *v.* Hoffmire, 3 Edw. Ch. 173, pp. 345, 355.
 Hog *v.* Morris, 13 Gray, 519, p. 318.
 Hogg *v.* Martin, Riley, 156, pp. 476, 477, 486, 487, 490, 493, 527.
 Hognennin *v.* Barclay, 14 Ves. 300, p. 467.
 Holbert *v.* Montgomery's Admrs. 5 Dana, 14, pp. 355, 410, 411.
 Holbrook *v.* Murray, 5 Wend. 161, p. 356.
 Holbrook's Case, 5 Cowen, 35, pp. 382, 383.
 Holdgate *v.* Slight, 2 Lown. M. & P. 662, p. 98.
 Holdsworth, *Ex parte*, 4 Bing. N. C. 368; 5 Scott, 170, p. 171.
 Holiday *v.* Scott, Ca. Pr. 65, p. 329.
 Holker *v.* Parker, 7 Cranch, 436, pp. 350, 375, 397, 398, 401, 404.
 Holland, *In re*, 7 Law R. Q. B. 297, p. 90, 95.
 Hollenbeck *v.* Stanberry, 38 Iowa, 325, p. 512.
 Hollings *v.* Booth, 2 Fost. & F. 220, p. 570.
 Hollington, *Ex parte*, 43 Law J. Ch. 99, pp. 415, 489.
 Hollingworth *v.* Duaine, Wall. 141, p. 184.
 Hollis *v.* Claridge, 4 Taunt. 809, pp. 607, 613, 614, 616.
 Holloway *v.* Laide, 7 Port. 488, p. 164.
 Holman *v.* Kimball, 22 Vt. 555, p. 291.
 v. King, 7 Met. 384, p. 503.
 Holmes *v.* Barbin, 15 La. An. 553, p. 261.
 Holmes *v.* Baddeley, 1 Phil. 476, p. 292.
 v. Peck, 1 R. I. 242, pp. 472, 473, 483.
 Holmes *v.* Penny, 9 Ex. 584; 2 Car. Law Rep. 100, 4 Law. J. Ex. 132, pp. 50, 503, 575.
 Holmes *v.* Rogers, 13 Cal. 191, pp. 343, 398.
 Holt *v.* Alloway, 2 Blackf. 108, p. 350.
 v. Squire, Ryan & M. 282, pp. 389, 391.
 v. Vincent, 4 Taunt. 452, p. 557.
 Hood *v.* Fahnestock, 8 Watts, 489, p. 407.
 Hooker *v.* Axford, 33 Mich. 433, p. 454.
 Hooper *v.* Harcourt, 1 H. Black. 534, p. 270.
 v. Zill, 1 Doug. 192, p. 544.
 Hoopes *v.* Burnett, 26 Miss. 428, p. 445.
 Hopewell *v.* Amwell, 2 Halst. 4, pp. 558, 608, 610.
 Hopkinson *v.* Smith, 7 Moore, 337; 1 Bing. 13, pp. 43, 100, 444, 570.
 Hopkins *v.* Mallard, 1 Greene, 117, p. 569.
 v. Willard, 14 Vt. 474, p. 410.
 Hopwood *v.* Adams, 5 Burr. 2660, p. 99.
 Hopping *v.* Quinn, 12 Wend. 519, pp. 476, 479, 486, 489, 493, 497, 506, 556, 558, 573.
 Hornell *v.* Kinney, 1 How. Pr. 105, p. 234.
 Horsfall, *Ex parte*, 7 Barn. & C. 528; Man. & R. 306, pp. 172, 621.
 Hortop, *Ex parte*, 12 Ves. 352, p. 230.
 Hoskins *v.* Phillips, 16 Law J. N. S. Q. B. 333, pp. 139, 236, 237, 363, 523.
 Hotcher *v.* State, 18 Ga. 460, p. 211.
 Hotchkiss *v.* Leroy, 9 Johns. 142, pp. 562, 565, 566.
 Hough *v.* Edwards, 1 Hurl. & N. 171, p. 611.
 Houghton, *Ex parte*, 1 Glyn & J. 14, p. 174.
 Hounston *v.* Roberts, 1 Barnes, 18, pp. 182, 183.
 House *v.* Park, 2 Term R. 376, p. 613.
 Houston *v.* Mitchell, 14 Serg. & R. 507, p. 509.
 v. Frazier, 8 Ala. 81, p. 514.
 Houx *v.* Russell, 10 Mo. 246, pp. 514, 515.
 Hover *v.* Heath, 3 Hun. 283, p. 515.
 Howard *v.* Osceola, 22 Wis. 453, p. 615.
 v. Smith, 33 N. Y. Superior Court R. 124, p. 358.
 Howdon, *In re*, 9 Dowl. 970, p. 152.
 How *v.* Lawrence, 2 N. J. 99, p. 382.
 Howell *v.* Baker, 4 Johns. Ch. 118, pp. 456, 462, 464, 465, 469.
 v. Commonwealth, 4 Leigh, pp. 213, 588.
 v. Harding, 8 East, 362, pp. 608, 628.
 v. Ransom, 11 Paige, 538, pp. 451, 452, 458, 462, 465, 468.
 v. Young, 5 Barn. & C. 259, pp. 44, 447, 449, 519, 520, 528, 530.
 Howell's Heirs *v.* McCreery's Heirs, 7 Dana, 388, p. 459.
 Howes *v.* Martin, 1 Esp. N. P. C. 161, p. 563.
 Howland *v.* Ralph, 3 Johns. 20, p. 184.

- Hubbard, Ex parte, 1 D. P. C. 438, p. 87.
 Hubbard v. Phillips, 2 Dowl. & L. 704;
 13 Mees. & W. 703, pp. 137, 345, 362,
 368, 369, 489, 508, 523.
 Hudson v. Hawley, 1 Crompt. & J. 373,
 p. 137.
 v. Johnson, 1 Wash. 10, p. 374.
 v. Mitchell, 14 Serg. & R. 307,
 pp. 399, 404.
 Huges v. Hollingsworth, 1 Murph. 146,
 p. 376.
 v. Mayor, 3 T. R. 275, p. 134.
 Hughes, Ex parte, 5 Barn. & Ald. 482,
 pp. 136, 137, 139, 482, 232.
 Hughes v. Boyce, 2 La. An. 803, p. 526.
 v. Garnous, 6 Beav. 352, p. 256.
 v. Mayre, 3 Durn. & E. 275, p.
 620.
 v. Mulvey, 1 Sand. 92, p. 563.
 v. Scirace, 2 Atk. 173, p. 47.
 Hulls v. Lee, 11 Jur. 891; 10 Q. B. 940,
 p. 225.
 Hull v. Lyon, 27 Mo. 570, pp. 271, 280.
 Humphrey v. Browning, 46 Ill. 476, p.
 610.
 v. Cunning, 5 Wend. 90, p.
 201.
 v. Harvey, 1 Bing. N. C. 62,
 pp. 562, 100.
 Huntington v. Bunnell, 3 Day, 390, pp.
 482, 509, 528.
 Hunter v. Aitkins, 3 Mylne & K. 113,
 pp. 452, 465.
 Hunter v. Coldwell, 16 Law J. Q. B. N.
 S. 274, pp. 475, 477, 487, 488, 490, 494,
 497.
 Hunter, Ex parte, 2 W. Va. 122, pp. 68,
 81.
 Hunter v. Neck, 3 Man. & G. 183; Gibb,
 187, pp. 204, 340.
 Huntley v. Bulwer, 6 Bing. N. C. 511,
 pp. 494, 506, 557, 571.
 v. Company, 1 Fost. & F. 211,
 p. 473.
 Hunt v. Blaquiere, 4 Bing. 388, p. 220.
 v. McClanahan, 1 Heisk. 503, pp.
 606, 625.
 v. Printup, 28 Ga. 297, p. 231.
 v. Slate, 49 Ga. 225, p. 215.
 v. Van Bomhost, 1 Md. 504, p. 262.
 Hurd v. Moring, 1 Car. & P. 372, pp.
 306, 309, 310, 319, 383, 399.
 Hurst v. Durnell, 1 Wash. 438, p. 553.
 Hussey v. Jordon, Doug. 381, p. 203.
 v. Welby, Sayers, 218; Cro.
 Eliz. 117; 2 Ld. Raym.
 1048, pp. 423, 436.
 Huston v. Mitchell, 14 Serg. & R. 307,
 pp. 383, 405, 423.
 Hutchings v. Gilman, 9 N. H. 359, p.
 512.
 Hutchinson v. Gascoigne, Holt. N. P.
 507, p. 44.
 v. Howard, 15 Vt. 544, pp.
 610, 611.
 v. Peters, 18 Vt. 616, pp.
 610, 611, 626.
 Hutchins v. Hutchins, 1 Hogan, 315, p.
 437.
- Hutley v. Hutley, Law R. 8 Q. B. 112,
 p. 589.
 Hynman v. Washington, 2 McCord, 493,
 pp. 150, 173.
- I.
- Ingle, In re, 21 Beav. 275; 1 Jur. N. S.
 1059; 25 Law J. Ch. 169, p. 539.
 Ingersoll v. Howard, 1 Heisk. 247, pp.
 63, 68.
 v. Moore, 33 Miss. 667, p. 553.
 Ingraham v. Leland, 19 Vt. 304, p. 224.
 v. Richards, 2 La. An. 841,
 pp. 63, 68, 377.
 Inhabitants of Woburn v. Henshaw, 101
 Mass. 193, p. 293.
 Inhabitants of Buckland v. Inhabit-
 ants, etc., 16 Mass. 396, p. 403.
 Ireson v. Pearman, 3 Barn. & C. 799,
 pp. 508, 518, 520.
 Irvine v. Spring, 7 Rob. (N. Y.) 293, p. 418.
 Irving v. Viana, 2 Younge & J. 70, pp.
 608, 610, 623.
 Irvinney v. Marks, 16 Mees. & W. 843,
 4 Dowl. & L. 109; 11 Jur. 355; 17 Law
 J. Ex. 165, p. 452.
 Irwin v. Workman, 3 Watts, 337, p. 610.
 Isacson, In re, Clarke & Brooke, 8
 Moore, 214, 322, p. 224.
 Iveson v. Connington, 2 Dowl. & R.
 307, pp. 136, 137, 139, 235, 236.
- J.
- Jackson v. Bartlett, 8 Johns. 361, pp.
 380, 383, 384, 424, 425, 426.
 v. Burtis, 14 Johns. 391, pp.
 259, 293, 299.
 v. French, 3 Wend. 337, pp.
 291, 418, 517, 150.
 v. McVey, 18 Johns. 330, pp.
 286.
 v. Powell, 2 Johns. Cas. 67, p.
 233.
 v. Stewart, 9 Johns. 34, pp.
 327, 347, 367.
 v. Telghman, 1 Miles, 31, p.
 502.
 v. Wilson, 12 Johns. 317, p.
 415.
 v. Yale, 1 Cowen, 215, p. 417.
 Jacob v. Magnay, 12 Law J. Q. B. 93;
 7 Jur. 326, 183, 139.
 Jacond v. French, 12 East, 317, p. 497.
 Jacques, In re, 2 Dowl. & R. 64, p. 224.
 Janeway v. Skerritt, 30 N. J. L. 97, p.
 390.
 Jarman v. Hooper, 13 Law J. N. S.
 Com. B. 63, pp. 237, 241.
 Jardine v. Sheridan, 2 Car. & P. 24, p.
 317.
 Jeffreys v. Evans, 3 Dowl. & L. 52; 11
 Mees. & W. 210; 14 Law J. Ex. 363, p.
 541.
 Jenkins v. Fereday, Law R. 7 Com. P.
 358, p. 229.

- Jenkins v. Gillespie, pp. 404, 405.
 v. Williams, 2 How. Pr. 261,
 pp. 579, 580.
- Jenny v. Delesdernier, 20 Me. 183, pp.
 378, 412, 415.
- Jennings v. Paine, 4 Wis. 358, pp. 207,
 216.
- Jerome v. Boeram, 1 Wend. 293, p. 433.
 v. Bowman, 1 Wend. 393, pp.
 429, 435.
- Jerome's Case, Cro. Car. 74, p. 147.
- Jeter v. Haviland, 24 Ga. 196, pp. 402,
 405.
- Jewett, In re, 10 Jur. N. S. 814; 33 L.
 J. Ch. 730; 33 Beav. 559; 12 Week.
 R. 94, 95; 10 L. T. N. S. 256, p. 210.
- Jewett v. Wardleigh, 32 Mo. 110, pp.
 411, 415.
- Johnson v. Alston, 1 Camp. 176, pp.
 231, 497, 571.
 v. Bixby, 5 Barn. & Ald. 540,
 p. 312.
 v. Bray, 2 Brod. & B. 698, p.
 203.
 v. Daverne, 19 Johns. 134,
 pp. 277, 281, 306, 319.
 v. Cunningham, 1 Ala. 249,
 p. 557.
 v. Ogilby, 3 P. Wms. 227, pp.
 229, 236, 240.
 v. Pyles, 19 Miss. 189, p. 579.
 v. Semple, 31 Iowa, 49, pp.
 510, 511.
- Joliffe v. Hector, 12 Sin. 308, p. 44.
 v. Langdon, Ld. Raym. 342, p.
 197.
- Jones v. Bodeenor, 1 Ld. Raym. 135, p.
 205.
 v. Brown, 2 Ex. 359; 5 Dowl. &
 L. 716; 12 Jur. 380, p. 205.
- Jones, Ex parte, 3 Ad. & E. 74, p. 99.
- Jones v. Hunter, 21 How. 342, p. 367.
- Jones, In re, 1 Chit. 651, 186, p. 182.
- Jones v. Little, 7 Mees. & W. 423, p.
 245.
 v. Page, 44 Ala. 657, p. 99.
 v. Peate, 1 Strange, 556, p. 621.
 v. Powell, 1 Mod. 272, pp. 247,
 248.
 v. Pugh, 1 Ph. 96, p. 259.
 v. Ransom, 3 Ind. 327, pp. 401,
 411.
 v. Reade, 5 Ad. & E. 229; 2 Har.
 & W. 382, p. 570.
 v. Stevens, 11 Price, 235, pp. 244,
 249, 500, 562.
 v. Walcott, 2 Allen, 247, pp. 229,
 529.
 v. Williams, 5 Cold. 371, p. 364.
- Jordon v. Hess, 13 Johns. 492, p. 516.
- Joslin v. Cowell, 56 N. Y. 626, p. 455.
- Judah v. Dyott, 3 Blackf. 324, p. 513.
 v. Trustees, 23 Ind. 272, pp. 458,
 503.
- Judson v. Etheridge, 1 Crompt. & M.
 473, p. 613.
 v. Gray, 11 N. Y. 413, p. 234.
- Jupp v. Andrews, Cowp. 845, pp. 308,
 309, 310.
- K.**
- Kane v. Cook, 8 Cal. 449, p. 353.
 v. Haywood, 66 N. C. 1, pp. 156,
 441.
 v. Van Vraikin, 5 Paige, 62, pp.
 232, 509.
- Kaye v. De Mattos, 2 W. Black, 1, 323,
 p. 432.
 v. Denio, 7 Term. Rep. 671, p.
 197.
- Kearns, In re, 11 Jur. 521, p. 136.
- Keddle, Ex parte, 4 Best. & S. 993, p.
 87.
- Keegan v. Mowlds, 10 L. T. N. S. 822,
 p. 97.
- Keeley v. Lynch, 9 Ir. L. R. 563, p.
 204.
- Keene v. Ward, 7 Dowl. & L. 334; 13
 Q. B. 515; 14 Jur. 65; 19 Law J. Q. B.
 46, p. 543.
- Kell v. Nainby, 10 Barn. & C. 205; M.
 & R. 76, pp. 506, 556.
- Keller v. Scott, 10 Miss. (2 Smedes &
 M.) 81, p. 380.
- Kellett v. Kelley, 5 I. R. Eq. 274, p.
 609.
- Kelley, Ex parte, 62 N. Y. 178, p. 149.
- Kellogg v. Gilbert, 10 Johns. 220, pp.
 410, 414, 424, 384, 386.
 v. Kellogg, 6 Barb. 116, pp.
 295, 296.
 v. Morris, 5 Eng. 18, p. 562.
 v. Morris, 10 Ark. 18, p. 419,
 421.
- Kelly, In re, 62 N. Y. 198; 59 Ibid. 695,
 p. 233.
- Kemp v. Burt, 1 Nev. & M. 262; 4
 Barn. & Adol. 424, pp. 474, 475, 482,
 488, 496, 615, 617.
- Kendry v. Hodgson, 5 Esp. 228, p. 236.
- Kennedy v. Brown, 13 Com. B. N. S.
 677, pp. 53, 384, 535.
 v. Green, 3 Myl. & K. 699, p.
 408.
- Kent v. Ricards, 3 Md. Ch. 392, pp.
 347, 377, 380.
- Kent, In re, 2 Car. & K. 197, p. 52.
- Kentucky Bank v. Cowles, 7 Pa. 543,
 pp. 568, 574.
- Kenyon v. Shred, 52 Ill. 382, p. 366.
 v. Sutherland, 3 Gilm. 99, p.
 214.
- Keon v. Nesbit, 1 Sausse & S. 365, p.
 437.
- Kerby v. Chadwell, 10 Mo. 392, p. 485.
- Kernaghan v. Waderson, 3 Car. Law
 Rep. 764, p. 539.
- Kerr v. Kerr, 41 N. Y. 272, p. 353.
- Kerrison v. Wallingborough, 5 Dowl.
 565, p. 326.
- Ketchum, Ex parte, 4 Hill, 564, p. 184.
- Key v. Vattier, 10 Ohio, 132, pp. 164,
 165, 592.
- Keys v. Tavernier, 1 Chit. 291, p. 433.
- Kibbey v. Weyberg, 12 Mod. 25, p. 329.
- Kile v. Lumpkin, 40 Ga. 506, p. 476.
- Killebrew v. Tewynard, Dyer, 25a, 230a,
 363a, p. 326.

- Kilway v. Kilway, Cary, 126, p. 253.
 Kimball & Co. v. Geary, 15 Vt. 414, p. 412.
 Kimbro v. Waller, 21 Ala. 376, p. 511.
 Kimmill v. Bittner, 62 Pa. 203, p. 512.
 King v. Archer, 2 B. C. 192; 5 Dowl. & L. 412, p. 429.
 c. Boddington, 8 Dowl. & R. 726, p. 254.
 c. Cartee, 1 Pa. 147, p. 381.
 c. Harrison, 15 East, 615, pp. 237, 241.
 King, In re, 8 Q. B. 129, pp. 147, 152, 155, 160.
 King of Spain v. Oliver, 2 Wash. C. C. 429, p. 351.
 King v. Pinsonneault, 6 Law R. P. C. 245, p. 387.
 c. Pope, 28 Ala. 602, p. 419.
 c. Southerton, 6 East, 127, p. 141.
 Kirk v. Glover, 5 Stewt. & P. 34, p. 380.
 Kirkham v. Whaley, 1 Ld. Raym. 27, p. 199.
 Kirkley v. Jones, 7 Ala. 622, p. 379.
 Kirwan v. Goodman, 5 Jur. 293, p. 154.
 Kisling v. Shaw, 33 Cal. 425, pp. 451, 452, 458, 462.
 Kite v. Millman, 2 Moore & S. 616, pp. 137, 139.
 Klingensmith v. Kepler, 41 Ind. 341, p. 151.
 Knight v. Hall, 1 Bing. 142, p. 157.
 c. Harrison, 4 Mees. & W. 270, p. 621.
 Knight, In re, 1 Bing. 41, pp. 134, 139, 148.
 Knight v. Sawin, 6 Greenl. 361, p. 163.
 c. Lord Plymouth, 3 Atk. 480, p. 456.
 c. Quarles, 2 Brod. & B. 102, pp. 492, 498, 499, 518, 520.
 Knowles v. Company, 19 Wall. 58, p. 357.
 Knowlton v. Plantation, 14 Me. 20, p. 343.
 Krause v. Dorrance, 10 Barr. 462, pp. 479, 513, 515.
 Kreckler v. Thaule, 47 How. Pr. 138, pp. 427, 435.
 Kronschable v. Knoblauch, 21 Minn. 56, pp. 424, 385.
 Kyle, Ex parte, 1 Cal. 331, p. 610.
- L.**
- Lacoste v. Roberts, 11 La. An. 33, p. 378.
 Lafferty v. Jelly, 22 Ind. 471, p. 592.
 Lafone v. Company, 4 Kay & J. 34, pp. 288, 391.
 Lagood v. Patterson, 2 Blackf. 327, p. 338.
 Laidler v. Elliott, 3 Barn. & C. 738, pp. 483, 498, 519.
 Laing v. Barclay, 3 Stark, R. 42, pp. 258, 294.
 c. Cundale, 1 H. Black. 76, p. 219.
 Lake v. Ingham, 3 Vt. 158, p. 625.
 Lamberson, In re, 63 Barb. 297, p. 611.
 Lambert v. Buckmaster, 2 Barn. & C. 616, p. 614.
 Lambert, Ex parte, 3 Moore & P. 269, p. 94.
 Lambert v. People, 9 Cowen, 578, p. 163.
 c. Sanford, 3 Blackf. 137, pp. 381, 382, 509.
 Lamphier v. Phipos, 8 Car. & P. 475, pp. 474, 483, 484.
 Lander v. Caldwell, 4 Kan. 339, p. 579.
 Langdon v. Castledore, 30 Vt. 286, p. 438.
 c. Godfrey, 4 Fost. & F. 445, p. 527.
 c. Potter, 13 Mass. 320, pp. 373, 401.
 c. Stapledon, 30 Vt. 285, pp. 425, 426.
 Langley v. Stapleton, Barnes, 40, pp. 424, 428, 432, 434.
 c. Warner, 1 Sand. 209, p. 446.
 Langsfield v. Richardson, 52 Miss. 441, p. 260.
 Langstraft v. Taylor, 14 Ves. 262, p. 547.
 Langton v. Wood, 3 Lond. Jur. 124, p. 136.
 Lanis v. Barclay, 3 Stark. 48, p. 270.
 Lann v. Church, 4 Madd. 391, pp. 605, 608, 611, 612.
 Lansing v. McKillup, 7 Cowen, 416, pp. 557, 417.
 Laskley v. Cassell, 23 Ind. 600, p. 457.
 Latham v. Hyde, 1 Crompt. & M. 128, pp. 96, 557.
 Lathrop v. Bank, 9 Met. 489, pp. 163, 164.
 Latuche v. Pachernate, 1 Salk. 86, pp. 375, 387.
 Law v. Ewell, 2 Cranch C. C. 144, pp. 548, 556.
 Law, Ex parte, 35 Ga. 285, p. 68.
 Lawless v. Timms, 3 Dowl. O. S. 707, p. 202.
 Lawrence v. Harrison, Style, 426, pp. 423, 497, 516.
 c. Potts, 6 Car. & P. 428, p. 521.
 c. Warner, 1 Cowen, 98, p. 203.
 Lawson v. Bittison, 12 Ark. 410, p. 373.
 c. Dickinson, 8 Mod. 307, pp. 613, 615, 619.
 Layton v. Wood, 3 Jur. 124, p. 176.
 Lea v. White, 4 Sneed, 111, p. 216.
 Leach v. Fowler, 22 Ark. 143, pp. 457, 464.
 c. Strange, 3 Hawks, 121, p. 568.
 Leacroft, Ex parte, 4 Barn. & Ald. 90, p. 97.
 Learned v. Haley, 34 Cal. 608, p. 453.
 Learson v. Darrington, 32 Ala. 227, p. 556.
 Leaver v. Whalley, 2 D. P. C. 800, p. 544.
 Leavitt v. Wallace, 12 N. H. 489, p. 343.
 Lecatt v. Salle, 3 Port. 115, pp. 451, 464, 468, 549, 553, 558, 579, 580, 602.
 Ledwick, Ex parte, 8 Ves. 183, p. 199.

- Lee v. Ayrton, Peake*, 119, pp. 43, 498, 499, 501.
v. Dixon, 3 Fost. & F. 744, pp. 483, 488, 490.
v. Jones, 2 Camp. 496, p. 330.
v. Page, 7 Jur. N. S. 768, p. 91.
Lee, Ex parte, 2 Ves. Jr. 285, p. 614.
Lee, In re, Law Rep. 4 Ch. 43, p. 445.
Legard v. Foote, Finch, 82, p. 267.
Legere v. Richard, 10 La. An. 669, p. 371.
Legett, Ex parte, 3 Jur. N. S. 1219, p. 94.
Legg v. Drake, 1 Ohio St. 286, p. 214.
Leigh's Case, 1 Munf. 468, pp. 141, 148, 74.
Leisenring v. Blake, 5 Watts, 303, pp. 456, 459, 462.
Le Neve v. Le Neve, 3 Atk. 650, p. 407.
Lepard v. Vernon, 2 Ves. & B. 54, p. 327.
Leshner v. Rossner, 3 Hun, 217, pp. 606, 625.
Lessee of Flynn v. Marshall, 1 Irish Law R. O. S. 57, p. 437.
Lester v. Watkins, 41 Miss. 647, p. 342.
Lethbridge v. Luxmore, 1 Dowl. & R. 511; 5 Barn. & Adol. 398, pp. 539, 545.
Letts, In re, 31 Beav. 488; 8 Jur. N. S. 1119; 32 Law J. Ch. 100; 11 Week. R. 15; 7 L. T. N. S. 307, p. 546.
Levers v. Van Buskirk, 4 Pa. 309, p. 314.
Levi v. Abbott, 4 Ex. 583; 19 Law J. Ex. 26, pp. 377, 409.
Levy v. Pope, Moody & M. 410, pp. 282, 298, 309.
Lewis' Case, 2 Mod. 181, p. 199.
Lewis v. Collard, 14 Com. B. 408; 2 Com. Law Rep. 1345; 23 Law J. Com. P. 32, pp. 484, 503.
v. Gamage, 1 Pick. 347, pp. 380, 402, 411.
v. Hillman, 3 H. L. Cas. 607; pp. 457, 463, 465.
v. J——— A———, 4 Edw. Ch. 599, pp. 135, 451, 465, 468, 587.
v. Kerr, 2 Mees. & W. 226; S. C. 5 Dowl. 447, p. 203.
v. Knight, 1 Dowl. O. S. 261, p. 139.
v. Levy, El. B. & E. 537, p. 217.
v. Morgan, 3 Anstr. 769, pp. 445, 468, 548.
v. Nicholson, 16 Jur. 1041, p. 137.
v. Peck, 10 Ala. 142, pp. 421, 479, 507.
v. Pennington, 20 Law J. Ch. 670, p. 317.
v. Samuel, 8 Q. B. 485, pp. 506, 575, 589.
v. Sumner, 13 Met. 269, p. 377.
v. Tankerville, 11 Mees. & W. 109, p. 331.
v. Trickey, 20 Barb. 387, p. 564.
v. Walton, 4 Dowl. & R. 810, pp. 247, 350.
v. Walter, 3 Barn. & C. 138, p. 500.
Lewis v. Woodruff, 15 How. Pr. 539, p. 422.
v. Yale, 4 Fla. 418, p. 580.
Lewellyn v. Boddeley, 1 Hare, 527, p. 288.
Lewellyn, Ex parte, 2 Dowl. N. S. 701, p. 87.
Lichty v. Hugus, 55 Pa. 435, pp. 553, 556.
Lidjier v. Birch, 9 Ves. 69, p. 199.
Lightfoot v. Keane, 1 Mees. & W. 745; 2 Gale & D. 138; 16 Ves. 258, 275; 18 Ves. 282; Ves. 261, pp. 613, 617.
Lilburne, In re, 4 State Tr. 1329, p. 18.
Lillie v. Hoyt, 5 Hill, 399, pp. 445, 447.
Lincoln v. Windsor, 6 Hare, 158; 15 Jur. N. S. 965; 25 Law J. Ch. 255, p. 464.
Lindsey v. Jones, 23 Ala. 835, p. 598.
Linsley v. Sinclair, 24 Mich. 380, p. 449.
Linthcum v. Pennington, 5 Cranch C. C. 546, p. 291.
Linton v. Commonwealth, 46 Pa. 294, p. 228.
Lisle, In re, 11 State Tr. 322, p. 18.
Little v. Kellogg, 18 Wend. 528, p. 203.
v. McKeon, 1 Sand. 607, p. 228.
v. Philippotts, 8 Jur. N. S. 1175; 31 Law J. Q. B. 125, p. 625.
Livermore v. Rand, 26 N. H. 85, p. 559.
Livingston v. Cox, 6 Pa. 360, pp. 446, 506, 507, 523.
v. Radcliff, 6 Barb. 201, p. 405.
Lloyd v. Hannibal R. R. Co. 53 Mo. 509, pp. 211, 214.
Lockwood v. Black Hawk Co. 34 Iowa, 235, p. 377.
Lockwood, In re, 9 Nott & H. 346, p. 79.
Lomas v. Mellor, 5 Moore, 95, p. 628.
London v. Regor, 13 Q. B. 1, p. 96.
Long v. Orsi, 18 Com. B. 610, pp. 493, 494, 497, 505, 506.
Lonsdale v. Littledale, 2 H. Black. 270, p. 203.
Lord, In re, 2 Scott, 131, pp. 134, 160.
Lord v. Kellett, 2 Mylne & K. 1, pp. 329, 330, 344.
v. Wardle, 3 Com. B. 295, pp. 429, 438.
v. Wormley, Jacob, 580, pp. 615, 617, 624.
Lorimer v. Hollister, 1 Strange, 693; Anon. 6; Mod. 42, pp. 329, 337.
Loton v. Devereaux, 3 Barn. & Ad. 343, pp. 237, 241.
Love v. Hall, 3 Yerg. 408, pp. 426, 491.
v. Sheffelin, 7 Fla. 40, p. 218.
Lovegrove v. Deymond, 4 Taunt. 809, pp. 428, 431, 433, 438.
v. White, Law Rep. 6 C. P. 440, pp. 409, 426.
Loveridge v. Botham, 1 Bos. & P. 49, p. 564.
Lowe v. Hutchinson, 37 Me. 196, pp. 164, 587.
Lowe, In re, 8 East. 237, pp. 172, 619.
Lowry v. Grifford, 5 Car. & P. 234, pp. 477, 479, 480, 481, 493.

Lowther *v.* Carleton, 2 Atk. p. 407.
 Lucas *v.* Bank, 2 Stewt. 321, p. 407.
 Lucas, *In re*, 2 Jur. N. S. 65, p. 94.
 Lucas *v.* Peacock, 8 Beav. 177, p. 612.
 Luntley *v.* Nathaniel, 2 D. P. C. 51, p. 52.
 Lusk *v.* Hastings, 1 Hill, 656, p. 425.
 Luxmore *v.* Lethbridge, 5 Barn. & Ald. 898, pp. 44, 134.
 Lyddon *v.* Moss, 4 De Gex & J. 104; 5 Jur. N. S. 637, p. 544.
 Lymes *v.* Nipper, 12 Ad. & E. 377, p. 506.
 Lynch *v.* Coel, 13 Week. R. 846, p. 53.
 v. Commonwealth, 16 Serg. & R. 368, pp. 240, 472, 475, 480, 483, 548.
 v. Cowell, 12 L. T. N. S. 548, p. 491.
 v. State, 9 Ind. 541, pp. 213, 215.
 v. Williard, 6 Johns. Ch. 842, p. 549.
 Lynde *v.* Judd, 3 Day, 499, pp. 295, 296.
 Lyons, *Ex parte*, 1 W. W. & H. 174, p. 95.
 Lyons *v.* Gildwell, 8 Yerg. 1, p. 370.
 v. Williams, 42 Ga. 168, p. 354.
 Lytle *v.* State, 17 Ark. 608, p. 587.

M.

Maas *v.* Black, 7 Ind. 202, p. 305.
 Macbeath *v.* Ellis, 4 Bing. 478; 1 Moore & P. 513, pp. 409, 425.
 Macgregor, *In re*, Laird, 1 Ad. & E. 307, p. 292.
 Mackay *v.* Blackett, 9 Paige, 437, p. 238.
 v. Martin, 26 Tex. 57, p. 462.
 Mackenzie *v.* Yeo, 2 Curt. 866, p. 317.
 Mackey *v.* Ford, 5 Hurl. & N. 792, p. 216.
 v. Mackey, 43 Barb. 58, p. 626.
 MacLeod *v.* Wakley, 3 Car. & R. 311, pp. 368, 392.
 Macpherson *v.* Robinson, 1 Doug. 217, pp. 427, 431, 434, 432.
 Madden *v.* Farmer, 7 La. An. 580, p. 226.
 Maddison *v.* Bacon, 5 Bing. (N. C.) 246; 7 Scott, 207; 3 Jur. 248, p. 544.
 Maddox *v.* Cranch, 4 Har. & McH. 343, p. 234.
 Maddux *v.* Bevan, 39 Md. 485, pp. 384, 396, 397, 422.
 Magary *v.* Funtis, 5 Sandf. 375, p. 401.
 Magennis *v.* Parkhurst, 3 Green Ch. 433, p. 135.
 Magerum *v.* Sandiford, 3 Br. C. C. 233, p. 545.
 Magruder, *Ex parte*, 6 Am. Law Reg. N. S. 292, p. 63.
 Mahoney *v.* Bergin, 41 Cal. 423, p. 581.
 Maires *v.* Maires, 23 Eng. Law & Eq. 22, p. 344.
 Major *v.* Gibson, 1 Pat. & H. 48, pp. 579, 580, 587.
 Makinson, *Ex parte*, 18 Com. B. 661, p. 100.

Maliphant, *Ex parte*, 7 Moore, 495, p. 97.
 Mallory *v.* Benjamin, 9 How. Pr. 419, p. 296.
 Manchester Bank *v.* Fellows, 28 N. H. 802, pp. 327, 339, 341.
 Manchette *v.* Maulers, 2 Colo. T. 169, p. 292.
 Mandeville *v.* Guernsey, 38 Barb. 225, p. 314.
 Mangin *v.* Cheeney, 1 Hill, 145, p. 184.
 Man *v.* Fairchild, 2 Keyes, 106, p. 466.
 Mann *v.* Fairchild, 3 Abb. N. Y. App. 152; 14 Barb. 548, pp. 221, 224.
 Mann *v.* Nottage, 1 Younge & J. 367n, p. 219.
 Manners *v.* State, 2 Head, 213, p. 262.
 Manning *v.* Wilkins, 12 L. T. 249, p. 527.
 Mansfield *v.* Dorland, 2 Cal. 331, 507, pp. 628, 610.
 v. Wickerson, 26 Iowa, 482, pp. 511, 515.
 Mant *v.* Smith, 4 Hurl. & M. 324; 28 Law J. Ex. 234, p. 540.
 Marbourg *v.* Smith, 11 Kan. 554, pp. 386, 397, 398.
 March *v.* Ludlum, 3 Sand. Ch. 35, p. 262.
 Mardis *v.* Shackleford, 4 Ala. 493, pp. 507, 513, 514, 515, 416.
 Mare *v.* Lewis, Jr. Law Rep. 4 Eq. 235, pp. 455, 487, 520.
 Margarell *v.* Makilwaine, 2 N. R. 509, pp. 429, 431, 435.
 Maris, *In re*, 2 Ad. & E. 582, p. 539.
 Markley *v.* Amos, 8 Rich. 468, pp. 375, 405.
 Marr *v.* Smith, 4 Barn. & Ald. 466, p. 436.
 Marriott *v.* Hertford (Marquis), 13 Jur. 636; 19 Law. J. Q. B. 526, p. 299.
 Marsden's Bail, 4 Dowl. P. C. 654, p. 99.
 Marsh *v.* Ellsworth, 36 How. 532; 1 Sweeney, 52, p. 206.
 v. Gold, 2 Pick. 284, 285, pp. 482, 416.
 v. Howe, 36 Barb. 649, p. 278.
 v. Keith, 1 Drew. & S. 342, p. 317.
 v. Whitman, 21 Wall. 178, pp. 462, 465, 478, 482.
 Marshall *v.* Chiffs, 4 Camp. 133, pp. 378, 389, 391, 393.
 v. Meeks, 51 N. Y. 140, p. 606.
 v. Hagel, 1 Baily, 308, pp. 509, 381.
 Marston *v.* Downes, 6 Car. & P. 381, pp. 293, 297, 300, 309.
 Martin *v.* Amos, 13 Ired. 201, p. 164.
 v. Anderson, 21 Ga. 301, p. 277.
 v. Anderson, 7 Ex. 421; 21 Law J. Ex. 105, p. 281.
 v. Clark, 8 R. I. 389, p. 165.
 v. Hawks, 15 T. R. 405, p. 625.
 v. Hawks, 15 Johns. 405, p. 610.
 Martin, *In re*, 6 Beav. 237, pp. 140, 147.
 Martin *v.* Orndorff, 22 Iowa, 515, p. 211.
 v. Veeder, 20 Wis. 466, p. 593.

- Martinics v. Johnson*, 21 N. J. L. 1 Zab. 239, p. 437.
Martindale v. Falkner, 2 Dowl. & L. 600; 2 Com. B. 706; 10 Jur. 161; 15 Law J. P. C. 91, pp. 542, 562.
Marvel v. Manouvrier, 14 La. An. 3, pp. 355, 364.
Marvin v. Ellwood, 11 Paige, 365, pp. 512, 515, 446.
Marzetti v. Williams, 1 Barn. & Adol. 415, p. 509.
Masais's Case, 1 Keen, 74, p. 152.
Mason v. Ring, 2 Abb. Pr. N. S. 322, pp. 451, 457, 459, 460.
 v. Whitehouse, 4 Bing. N. C. 622; Scott, 575, p. 377.
Massie v. Mann, 17 Iowa, 131, p. 218.
Masterman, Ex parte, 6 Scott, 782, p. 95.
Masters v. Downes, 4 Nev. & M. 865; 1 Ad. & E. 31; 3 Car. & P. 381, p. 276.
Masterson v. Le Claire, 4 Minn. 163, p. 338.
Matchett v. Parks, 9 Mees. & W. 767, p. 98.
Mathews, Ex parte, 1 Barn. & Adol. 160, p. 87.
Mathews v. Livesly, 11 Ex. 221, p. 162.
 v. Royle, 6 Moore, 70, p. 183.
 v. Walwyn, 4 Ves. 119, p. 135.
Mathewson v. Fitch, 22 Cal. 86, p. 163.
Mathis v. Town, 62 Mo. 505, p. 485.
Matson, Ex parte, 2 Dowl. & R. 238, p. 97.
Matt v. Smith, 4 Barn. & Ald. 466, p. 625.
Mawle v. Grubb, 1 Barnes, 200, p. 199.
Maxam v. Place, 46 Vt. 434, pp. 258, 270.
Maxwell, Ex parte, 4 D. P. C. 87, p. 173.
Maxwell v. Owen, 7 Cold. 630, pp. 384, 415.
May v. Biggenden, 24 Beav. 207, p. 544.
 v. Brown, 4 Dowl. & R. 670; 3 Barn. & C. 113, p. 250.
 v. Pike, 5 Dowl. O. S. 667; 4 Mees. & W. 197; 2 London Jur. 597, p. 435.
 v. Williams, 17 Ala. 23, p. 210.
Maybury v. Mansfield, 16 Law J. Q. B. 102, pp. 230, 234.
Mayer v. Blease, 4 S. C. 10, pp. 382, 384.
 v. Foulkhead, 4 Wash. C. C. 511, pp. 397, 399.
Mayfield v. Cotton, 37 Tex. 229, p. 214.
Maynard v. Briggs, 26 Vt. 94, p. 556.
Maynard's Case, 2 Wils. 232, Anon. 1 Dowl. 208; 2 Johns. Cas. 102, p. 198.
Mayne v. Watts, 3 Swanst. 93, pp. 433, 429.
Mayor v. Berry, 4 Burr. 2116, p. 197.
 v. Fuller, 3 Ala. 137, p. 79.
McAdoo v. Lummis, 43 Tex. 227, p. 511.
McArthur v. Fry, 10 Kan. 231, p. 454.
McCaa v. Grant, 43 Ala. 262, p. 611.
McCall v. Copehart, 20 Ala. 521, p. 163.
McCarver v. Nealy, 1 Greene, 360, pp. 373, 380.
McConnell v. Brown, 40 Ind. 384, p. 385.
McCormick v. Malin, 5 Blackf. 509, pp. 452, 458.
McCrary v. Ruddick, 33 Iowa, 521, p. 561.
McCrea v. Bartlett, 8 Johns. 361, p. 410.
McCrillis v. Bartlett, 8 N. H. 569, p. 573.
McCulloch v. Maryland, 4 Wheat. 316, p. 79.
McCullough v. Guetner, 1 Binn. 214, 469, p. 337.
McDonald v. Moore, 34 Tex. 384, p. 454.
 v. Napier, 14 Ga. 89, p. 610.
 v. Paige, Wright, 121, p. 558.
 v. Todd, 1 Grant, 17, p. 414.
McDougald v. Lane, 18 Ga. 444, p. 284.
McDowell v. Baker, 29 Ind. 481, p. 511.
 v. Milroy, 69 Ill. 498, p. 454.
 v. Potter, 8 Barr, 187, pp. 562, 446.
McEgan v. Cochrane, 10 L. T. 37, p. 589.
McElrath v. Dupuy, 2 La. An. 521, pp. 580, 593.
McEwen v. Mazyck, 3 Rich. 210, p. 419.
McFarland v. Crary, 8 Cowen, 253; 6 Wend. 297, S. C., pp. 417, 506, 558, 515, 523.
McFadon's Executor v. Martin, 3 Har. & McH. 153, p. 224.
McGill v. McGill, 2 Met. (Ky.) 258, p. 417.
McGregor v. Comstock, 28 N. Y. 237, pp. 625, 626.
McGregor v. Keily, 2 Dowl. & L. 180; 16 Q. B. 514; 20 Law J. Q. B. 273, p. 540.
McKelvey v. Jones, 2 Har. (N. J.) 345, pp. 355, 364.
McKiernan v. Patrick, 4 How. (Miss.) 333, pp. 342, 344, 349.
McKinley v. Tuttle, 34 Cal. 235, p. 476.
McKinzie v. Wardell, 61 Me. 136, p. 625.
McKoan v. Derries, In re, 3 Barb. 196, p. 81.
McLain v. Watkins, 43 Ill. 24, p. 425.
 v. Williams, 8 Yerg. 230, pp. 558, 569, 585.
McLaughlin's Case, 5 Watts & S. 272, pp. 130, 142.
McLellan v. Longfellow, 32 Mo. 494, pp. 254, 267.
McMahon v. Smith, 6 Heisk. 167, p. 568.
McMath v. The State, 55 Ga. 306, p. 213.
McMicken v. Perrin, 18 How. 507, p. 222.
McMullan v. Birch, 1 Binn. 178, p. 216.
McNab v. Lockhart, 18 Ga. 495, pp. 211, 214.
McPherson v. Rathbone, 7 Wend. 216, p. 293.
McWilliams v. Hopkins, 1 Whart. 276; 4 Rawle, 392, pp. 476, 480, 498, 558.
Meacham v. Dudley, 6 Wend. 514, pp. 362, 364.
Meath v. Winchester, 10 Bligh, 375, p. 292.

- Meek v. Whalley*, 1 Bing. N. C. 59, p. 100.
Meggs v. Binns, 2 Bing. N. C. 625, pp. 135, 176.
Menzies v. Rodrigues, 1 Price, 92; 1 Sid. 31, pp. 329, 437, 526.
Mercer v. King, 1 Fost. & F. 490, pp. 483, 484.
Merchants' Bank v. Marine Bank, 3 Gill, 98, p. 389.
Merle v. Moore, 2 Car. & P. 275, pp. 270, 311, 312, 315, 321.
Merrinton v. A. Beckett, 2 Barn. & C. 81, pp. 151, 231, 526.
Merritt, In re, 5 Paige, 125, p. 150.
Merritt v. Lambert, 10 Paige, 352, pp. 140, 173, 176, 549, 558, 579, 580, 581.
 c. Lansing, 10 Paige, 352, p. 135.
 c. Putnam, 7 Minn. 493, p. 485.
Merriweather v. Mellish, 13 Ves. 161, pp. 428, 429, 622.
Meux v. Lloyd, 2 Com. B. N. S. 409, pp. 135, 179.
Mexico v. De Arangoiz, 5 Duer, 643, p. 347.
Meyer's Assignees v. Sexton, 2 Stark. 274, p. 283.
Michon v. Gravier, 11 La. An. 596, pp. 565, 566.
Middleton v. Hill, 1 Maule & S. 240; 1 Dowl. & R. 168, pp. 608, 628.
Miers v. Evans, 3 Jur. 170, p. 172.
Milan v. State, 24 Ark. 346, p. 285.
Milburn v. Codd, 1 M. & Rob. 238; 7 Barn. & C. 419, p. 570.
Miles v. Irvin, 1 McCord Ch. 524, pp. 451, 456, 462, 465, 468.
Millard, In re, 1 D. P. C. 140, p. 172.
Miller v. Alter, 3 Ex. 799; 13 Jur. 431; pp. 617, 614.
 v. Beal, 26 Ind. 234, pp. 553, 556.
 v. James, 8 Moore, 208, p. 137.
 v. Scott, 21 Ark. 396, p. 373.
 c. Weeks, 22 Pa. 89, pp. 254, 269.
 v. Wilson, 24 Pa. 114, pp. 494, 496, 517, 518, 520.
Mills v. Duryee, 2 Am. Leading Cases, p. 338.
Mills, In re, 1 Mich. 392, pp. 141, 148, 150, 157.
Mills v. Mills, 26 Conn. 213, pp. 441, 451, 465, 587.
 v. Oddy, 6 Car. & P. 728, p. 414.
Milward v. Temple, 2 Stark. 375; 1 Camp. 275; pp. 378, 389, 391, 392.
Milyard's Case, 1 Mod. 118, p. 558.
Minet v. Morgan, Law R. 8 Ch. 361, pp. 254, 275, 285, 313.
Mitchell v. Bromberger, 2 Nev. 345, p. 284.
 v. Cotton, 3 Fla. 136, pp. 382, 394.
Mitchell's Case, 12 Abb. Pr. 264, p. 293.
Mitchell v. Milhoun, 11 Kan. 617, p. 628.
 v. Oldfield, 4 T. R. 123, pp. 607, 610, 627.
Mohawk Bank v. Burrows, 6 Johns. Ch. 317, p. 628.
Moir v. Mudie, 1 Sim. & St. 282, p. 717.
Monro v. Buffington, 26 Miss. 184, p. 441.
Monson v. Hawley, 30 Conn. 51, p. 411.
Montesquieu v. Sandy, 18 Ves. 313, pp. 451, 457, 463, 467, 468.
Montgomery v. Deveraux, 7 C. C. & F. 188, pp. 480, 497, 509.
 v. Morris, 32 Ga. 173, p. 284.
 v. Pickering, 116 Mass. 227, pp. 258, 287.
Montrion v. Jefferys, 2 Car. & P. 113, pp. 471, 482, 483, 488, 501, 507.
Moody's Case, Barnes, 42, pp. 166, 198.
Mooney v. Lloyd, 5 Serg. & R. 412, pp. 548, 549, 558, 581.
Moore v. Angell, 11 Jur. 485, pp. 609, 625.
 c. Booth, 3 Ves. 350, p. 199.
 v. Bracken, 27 Ill. 23, pp. 462, 465.
Moore, Ex parte, 64 N. C. 202, pp. 140, 146.
Moore v. Froud, 1 Jur. 653, p. 570.
 v. Hall, 13 Week. R. 83; 11 Law T. N. S. 274; 17 Com. B. N. S. 760, p. 575.
 v. Terrill, 4 Barn. & Ad. 870, p. 254.
Mordecai v. Solomon, Sayers, 172, pp. 520, 526, 603, 135, 437, 491.
Morel v. New Orleans, 11 La. An. 485, p. 568.
Moreland v. Palsey, 2 H. Black. 441, pp. 627, 608.
Morgan v. Brown, 12 La. An. 159, p. 598.
 v. Currie, 3 Marsh. 294, p. 558.
 v. Lewes, 4 Dow. 29, p. 468.
 v. Roberts, 38 Ill. 65, pp. 554, 565, 422, 507, 600, 602.
 v. Shaw, 4 Madd. 57, p. 297.
 v. Taylor, 5 Com. B. N. S. 563; 5 Jur. N. S. 791; 23 Law J. Com. P. 178, p. 588.
 v. Thorne, 7 Mees. & W. 400, pp. 363, 369.
Morie v. Murdie, 1 Stu. 312, pp. 429, 433.
Mornington v. Mornington, 2 Johns. & H. 697, p. 308.
Morrill v. Graham, 27 Tex. 646, pp. 482, 500.
Morris, Ex parte, W. W. & D. 59; 1 Jur. 151, p. 173.
Morris v. Grier, 76 N. C. 410, p. 404.
Morris, In re, 2 Ad. & E. 582, p. 176.
Morris v. James, 2 Lond. Jur. 842, p. 139.
 v. Marcy, 4 Ham. 83, p. 184.
 v. Palmer, 36 N. H. 123, p. 573.
Morrison v. Hill, 42 N. H. 345, p. 573.
Morrow v. Parkman, 14 Ala. 769, p. 226.
Morse v. Porter, 13 Serg. & R. 100, p. 234.
Mosely, In re, 15 Week. R. 975, p. 615.
Moses, Ex parte, 9 Law R. Q. B. 1, pp. 89, 96.

- Mosness, In re, 39 Wis. 509, p. 81.
 Moss, In re, 35 Beav. 526, p. 615.
 Mostyn v. Mostyn, Law Rep. 5 Ch. Ap. 457, pp. 384, 420.
 Mott v. Foster, 45 Cal. 72, p. 385.
 v. Harrington, 12 Vt. 199, pp. 465, 593, 600.
 Mould v. Roberts, 4 Dowl. & R. 529, 719, pp. 137, 183.
 Moule, Ex parte, 5 Madd. 462, p. 606.
 Moulton v. Bennett, 18 Wend. 586, p. 174.
 Moulton v. Bowker, 115 Mass. 36, pp. 378, 401.
 Mountford v. Scott, 1 Turn. & R. 274, p. 617.
 Mowry v. Chase, 100 Mass. 79, p. 228.
 Moxon, Ex parte, 1 Dowl. O. S. 6, p. 172.
 Moye v. Cogdell, 69 N. C. 93, pp. 401, 404.
 M'Tavish v. Dunning, Anth. 82, 113, p. 281.
 Mudry v. Newman, 1 Cromp. M. & R. 402, pp. 361, 363, 369.
 Mulford v. Muller, 3 Abb. N. Y. App. 330, p. 278.
 Mullen v. Guest, 6 Tex. 275, p. 165.
 Mulligan v. McDonough, 2 Law T. N. S. 136, p. 51.
 Mumford v. Murray, 1 Hopk. 369, pp. 428, 429, 430, 434.
 Munnikuyson v. Dorsett, 2 Har. & G. 374, pp. 236, 330, 523.
 Munson v. Washband, 31 Conn. 303, p. 573.
 Murphy v. Cunningham, 1 Anst. 271, p. 628.
 Murphy v. The State, 6 Ind. 490, p. 213.
 Murray, Ex parte, Turn. & R. 56, p. 97.
 Murray v. House, 11 Johns. 464, p. 381.
 Myers v. Crockett, 14 Tex. 259, pp. 603, 553.
 Myers, In re, 8 Q. B. 515, pp. 96, 161.
 Mygatt v. Wilcox, 45 N. Y. 306, pp. 424, 554, 579.
 Mynn v. Joliffe, 1 Moody & R. 327, pp. 254, 273.
- N.**
- Naglee v. Ingersoll, 7 Pa. 185, p. 404.
 Narraguagus v. Wentworth, 36 Me. 339, p. 422.
 Nash, Ex parte, 6 Scott N. R. 695, p. 91.
 Nash v. Goode, 9 D. P. C. 929, p. 176.
 v. Swinburne, 3 M. & G. 630; 4 Scott N. S. 326, pp. 477, 493.
 Nathan v. Giles, 5 Taunt. 558, p. 614.
 Nave v. Baird, 12 Ind. 318, pp. 373, 472, 504.
 Neal, Ex parte, 1 Buck, 111, p. 548.
 Neal v. Holden, 3 Dowl. 493, p. 152.
 Neale v. Postlethwaite, 8 D. P. C. 100, p. 547.
 Needham v. Dowling, 15 Law J. Com. P. 9, pp. 51, 216.
 Neil v. Staten, 7 Heisk. 290, p. 628.
 Nelson v. Cook, 19 Ill. 440, p. 413.
 v. Wilson, 6 Bing. 586, pp. 625, 629.
 Nesbit, Ex parte, 2 Schoales & L. 279, pp. 612, 613, 614, 615, 616.
 Nesbitt v. Lockman, 34 N. Y. 167, pp. 451, 460.
 Newbaker v. Alricks, 5 Watts, 183, p. 610.
 Newbert v. Cunningham, 50 Me. 231, p. 610.
 Newberry, In re, 4 Ad. & E. 100; 5 Nev. & M. 419; 1 Har. & W. 375, p. 175.
 Newberry v. Lee, 3 Hill, 523, p. 241.
 Newcastle v. Bellard, 3 Me. 369, p. 514.
 v. Kindersley, 8 Ves. 363, p. 44.
 Newcomb v. Peck, 17 Vt. 302, p. 343.
 v. Dewey, 27 Iowa, 381, p. 364.
 Newfield v. Copperman, 15 Abb. Pr. N. S. 360, p. 206.
 New Hampshire Co. v. Noyes, 32 N. H. 345, p. 573.
 New v. Jones, 1 Macn. & G. 668, p. 464.
 New Kirk v. Cone, 18 Ill. 499, pp. 165, 586, 595.
 Newman v. Brodey, 1 Dall. 241, p. 228.
 Newman, In re, 30 Beav. 196, p. 539.
 Newman v. Payne, 2 Ves. Jr. 199, pp. 445, 450, 451, 452, 457, 468.
 v. Washington, Mart. & Y. 79, p. 549.
 v. Harrison, Ca. Pr. C. P. 140, p. 199.
 Newton v. Chaplin, 10 Com. B. 356, p. 52.
 v. Harland, 4 Scott N. S. 769, pp. 428, 624.
 v. Harland, 8 Scott, 70, p. 52.
 v. Judges, 4 Law R. P. C. 18, p. 135.
 v. Porter, 5 Lans. 416, p. 615.
 v. Rowland, Ld. Raym. 533; 12 Mod. 316, p. 200.
 Nicholas v. Hayter, 2 Ad. & E. 348, p. 539.
 Nicholl v. Nicholl, 16 Wend. 445, pp. 627, 628.
 Nichols, Ex parte, 2 Dowl. N. S. 423; 7 London Jurist, 374, p. 172.
 Nichols, In re, 2 Dowl. N. S. 423, p. 95.
 Nichols v. Dennis, R. M. Charlt. 188, p. 424.
 v. Scott, 12 Vt. 47, pp. 553, 556.
 v. Wilson, 2 Dowl. N. S. 1031; 12 Law J. Ex. 266; 11 Mees. & W. 106, pp. 525, 560, 570, 575.
 v. Wilson, 11 Mees. & W. 106; 12 L. T. N. S. 266, pp. 437, 521.
 Nicholson v. Styles, 2 Ex. 213, p. 52.
 Nightingale v. Railroad, 2 Savy. 339, pp. 385, 386, 407.
 Niles, In re, 5 Daly, 465, p. 148.
 Ninety-nine Plaintiffs v. Vanderbilt, 1 Abb. Pr. 193, pp. 312, 328, 344, 345, 346.

- Nisbet v. Lawson, 1 Ga. 275, pp. 483, 510, 511, 527.
 Nixon v. Hewitt, 10 Moore, 270, p. 97.
 v. Moyoh, 1 Moody & R. 76, p. 173.
 v. Phelps, 3 Wils. 198, pp. 503, 556, 572.
 Noble v. Gold, 1 Mass. 410, p. 356.
 Noel v. Hart, 8 Car. & P. 230, pp. 563, 570.
 Norfolk, Duke of, Trial of, 1 St. Tr. 965, p. 18.
 Norris v. Bacon, 1 Vern. 312, p. 558.
 v. Douglas, 5 N. J. L.; 2 South. 817, p. 347.
 Northfield v. Orton, 1 D. P. C. 415, p. 137.
 North Missouri Railroad Co. v. Stephens, 36 Mo. 150, p. 392.
 Northwestern Co. v. Sharp, 20 Eng. L. & E. 555, pp. 473, 483, 526.
 Norton v. Cooper, 3 Smale & G. 375, pp. 140, 345, 364, 507.
 v. Curtis, 3 Dowl. Pr. 245, p. 99.
 Nuñez v. Modigliani, 1 H. Black. 217, pp. 608, 628.

O.

- Oakley v. Davis, 16 East, 82, p. 242.
 Oates v. Woodward, 1 Salk. 87, pl. 6, p. 427.
 O'Barr v. Alexander, 37 Ga. 195, p. 483.
 O'Brien v. Cantwell, 12 Ir. Ch. R. 22, p. 53.
 v. Lewis, 9 Jur. N. S. 528; 32 Law J. Ch. 569; 11 Week. R. 318; 8 Law T. N. S. 179, p. 464.
 O'Dea v. O'Dea, 1 Schoales & L. 315, p. 328.
 Odell v. Odell, 1 Irish Ex. 81, pp. 363, 369.
 Odes v. Woodward, 2 Ld. Raym. 849, p. 354.
 Odlin v. Stetson, 17 Me. 244, pp. 526, 527.
 O'Flynn v. Eagle, 7 Mich. 306, p. 343.
 Ogden v. Des Arts, 4 Duer, 275, p. 580.
 v. Hughes, 2 South. 718; 5 Wend. 90, pp. 199, 204, 198.
 v. Saunders, 12 Wheat. 266, p. 69.
 Ogle v. Story, 4 Barn. & Adol. 735; 1 Nev. & M. 734, pp. 613, 614, 615, 616.
 O'Hara v. Brophy, 24 How. Pr. 379, pp. 496, 507, 521, 523.
 Ohio v. Chapman, 11 Ohio, 430, pp. 141, 155.
 Oldham v. Hand, 2 Ves. 259, pp. 450, 467.
 v. Sparks, 28 Tex. 425, pp. 476, 510.
 Oldknow's Case, 6 Best & Smith, 703, p. 155.
 Oliver, In re, 4 Nev. & M. 471; 1 Har. & W. 79, p. 443.
 In re, 2 Ad. & E. 629, p. 152.

- Oliver v. Pate, 43 Ind. 132, p. 293.
 v. Thomas, Ld. Raym. 2, p. 562.
 Oppenheim v. Harrison, 1 Burr. 20, p. 99.
 Oppenshaw v. Whitehead, 9 Ex. 384; 2 Car. Law Rep. 553; 23 Law J. Ex. 97, p. 544.
 Orcutt v. Pettit, 4 Den. 233, pp. 224, 562.
 Ormerod v. Tate, 1 East, 464, pp. 605, 608, 610.
 Orphan Asylum v. Miss. Mar. Ins. Co. 8 La. 185, p. 583.
 Orton v. McCord, 33 Wis. 205, p. 270.
 Osbaston's Case, 30 Eliz. Cro. Car. 74, p. 147.
 Osborne, In re, 25 Beav. 353; 4 Jur. N. S. 296; 27 Law J. Ch. 532, p. 539.
 Osborn v. Bank, 9 Wheat. 738, pp. 329, 334, 338, 343, 350, 562.
 Ottley v. Gilby, 8 Beav. 602, p. 444.
 Ouston v. O'Bryan, Barnes, 145, p. 605.
 Owen, Ex parte, 6 Ves. 11, p. 166.
 Owen v. Knight, 4 Bing. N. C. 54, pp. 621, 624.
 v. Ord, 3 Car. & P. 349, pp. 326, 330.
 v. Scales, 2 Dowl. N. S. 304; 10 Mees. & W. 657; 6 Jur. 1000; 12 Law J. Ex. 26, p. 539.
 Owings v. Hall, 9 Peters, 629, p. 419.
 Oxenham v. Lemon, 2 Dowl. & R. 461, pp. 331, 541.
 v. Esdaile, 3 Barn. & C. 225, pp. 614, 622.
 Oxfordshire, In re, 2 Car. & K. 200, p. 52.

P.

- Paddock v. Beebe, Cole, 135; 2 Johns. Cas. 117, p. 417.
 v. Colby, 18 Vt. 485, p. 420.
 Padmore v. Lawrence, 11 Ad. & E. 380, p. 207.
 Paget v. Chambers, 5 Bing. 630, pp. 136, 152.
 Paige, Matter of, 1 Bing. 160, pp. 86, 136, 152.
 Paige v. Stubbs, 39 Iowa, 537, pp. 458, 460.
 Paine v. Hall, 18 Ves. 475, p. 467.
 Paine, In re, 5 Com. B. 407, p. 547.
 Painter v. Abell, 11 Week. R. 651; 8 Law T. N. S. 287; 33 Law J. Ex. 60, p. 467.
 Painter v. Linsell, 8 Scott, 453; 8 D. P. C. 250, p. 539.
 Palmer v. Ashley, 3 Pike, 75, p. 483.
 v. Cohen, 3 Barn. & Adol. 966, p. 406.
 Palmer, In re, 1 Har. & W. 55, p. 155.
 Palmer v. Reiffenstein, 1 Man. & G. 94, p. 335.
 Pane v. Purcell, 1 Browne, 348, p. 155.
 Parker v. Butler, 2 Wm. Black. 780, p. 184.
 v. Carter, 4 Munf. 273, pp. 254, 291, 305, 418.

- Parker v. Gill, 10 Jur. 1096, p. 539.
 v. Marshall, Lofft. 271, p. 152.
 v. Rolis, 14 Com. B. 691, pp. 483, 484, 487, 490, 508.
 Parkhurst v. Lawton, 2 Swanst. 216, pp. 262, 266.
 Parkins v. Hawkshaw, 2 Stark. 239, pp. 290, 378, 388.
 Parmeter v. Reed, 1 W. W. & H. 575, p. 331.
 Parry v. Collins, 1 Esp. 399, pp. 250, 499.
 v. Owen, Amb. 109; 5 Sim. 667, p. 455.
 Parsons v. Gill, 1 Salk. 88, pl. 8; 1 Leon. 9, p. 340.
 Partington v. Bailee, 5 Sim. 667, p. 455.
 v. Woodcock, 2 Dowl. O. S. 550, p. 202.
 Partridge, Ex parte, 2 Mer. 500, 501, pp. 545, 620.
 Paschall, In re, 10 Wall. 483, pp. 428, 430, 438.
 Pasmore v. Birnie, 2 Stark. 59, p. 571.
 Pater, Ex parte, 5 Best & Smith, 299, p. 51.
 Paterson, In re, 1 Dowl. O. S. 468, p. 136.
 Patrick, Ex parte, 7 Jur. 993, p. 96.
 Patten v. Fullerton, 27 Me. 58, p. 405.
 v. Moore, 29 N. H. 163, p. 306.
 v. Wilson, 34 Pa. 299, p. 428.
 v. Wilson, 10 Casey, 299, pp. 587, 598.
 Payne v. Chute, 1 Roll. 365; Anon. 12 Mod. 440, p. 375.
 Pearce v. Pearce, 16 Law J. Ch. 153, pp. 256, 258.
 v. Whale, 5 Barn. & C. 39, p. 562.
 Pearce v. Pearce, 1 De Gex & S. 24, p. 292.
 Pearson v. Humes, Cart. 230, p. 163.
 v. Morrison, 2 Serg. & R. 20, p. 404.
 v. Sutton, 5 Taunt. 364, pp. 171, 621.
 Peate v. Dicken, 1 Crompt. M. & R. 422; 3 Dowl. 171, p. 562.
 Pechell v. Watson, 8 Mees. & W. 691, pp. 589, 562.
 Peck v. Williams, 13 Abb. 68, pp. 254, 296.
 Pemberton, Ex parte, 18 Ves. 382, pp. 612, 613, 616, 617.
 Pender, In re, 2 Ph. 69; 10 Jur. 891, p. 539.
 Pendexter v. Vernon, 9 Humph. 84, p. 401.
 Penniman v. Patchem, 5 Vt. 346, pp. 374, 383, 402.
 Pennington v. Nave, 15 Ind. 323, p. 586.
 v. Yell, 6 Eng. 212, pp. 472, 479, 484, 487, 490, 494, 495, 498, 502.
 Pennywit v. Foote, 27 Ohio St. 600, pp. 357, 358.
 Penobscot Bar v. Kemble, 64 Me. 140, pp. 140, 148.
 Penobscot Co. v. Lampson, 4 Shepley, 202, p. 343.
 People v. Alison, 68 Ill. 151, pp. 156, 178.
 v. Anderson, 44 Cal. 65, p. 214.
 v. Atkinson, 40 Cal. 284, pp. 316, 317.
 v. Barker, 56 Ill. 299, pp. 150, 156, 272.
 v. Blakely, 4 Parker Cr. C. 176, p. 278.
 v. Brotherson, 36 Barb. 662, pp. 510, 513, 515.
 v. Dowling, 55 Barb. 197, p. 155.
 v. Fletcher, 2 Scam. 486, p. 161.
 v. Ford, 54 Ill. 520, pp. 148, 178.
 v. Hallett, 1 Colo. 352, p. 149.
 v. Hardenburgh, 8 T. R. 355, p. 625.
 v. Harris, 23 Cal. 127, p. 485.
 v. Harvey, 41 Ill. 277, pp. 156, 158.
 v. Justices, 1 Johns. Cas. 181, pp. 142, 143.
 v. Keenan, 13 Cal. 501, p. 213.
 v. Mariposa Co. 39 Cal. 683, pp. 328, 348.
 v. Marsh, 3 Cowen, 334, p. 233.
 v. Mayor, 11 Abb. Pr. 66, pp. 379, 382, 392.
 v. Montgomery, 18 Wend. 633; 7 Paige, 615, pp. 237, 241.
 v. Nevins, 1 Hill, 154, pp. 160, 184.
 v. Palmer, 61 Ill. 255, p. 152.
 v. Rogers, 2 Paige, 103, p. 135.
 v. Sanborn, 1 Scam. 123, p. 497.
 v. Sheriff, 7 Abb. Pr. 96, pp. 296, 307.
 v. Smith, 3 Caines, 221, p. 150.
 v. Tefft, 3 Cowen, 340, p. 184.
 v. Tioga C. P. 19 Wend. 73, p. 626.
 v. Tryon, 4 Mich. 665, p. 178.
 v. Turner, 1 Cal. 148, pp. 142, 149, 161.
 v. Walbridge, 6 Cowen, 516; 3 Wend. 120, pp. 166, 222, 466.
 v. Willson, 5 Johns. 368, p. 150.
 Penderpleath v. Frazier, 3 Ves. & B. 176, p. 548.
 Pepper v. George, 51 Ala. 190, p. 407.
 Peppercorn, In re, 1 L. R. C. P. 473, p. 89.
 Percy, In re, 36 N. Y. 651, pp. 140, 143, 148, 150, 152.
 Peries v. Aycinena, 3 Watts & S. 64, p. 422.
 Perine v. Dunn, 3 Johns. Ch. 508, p. 163.
 Perkins v. Bradley, 1 Hare, 23, p. 611.
 Perring v. Rebutter, 2 Moody & R. 429, p. 536.
 Perrins v. Hill, 2 Jur. 858, p. 506.
 Perry v. Clark, 5 How. (Miss.) 502, p. 524.
 v. Fisher, 6 East, 549, pp. 431, 433.
 v. Lord, 111 Mass. 504, p. 568.

- Perry v. Smith, 1 L. J. N. S. 269; 4 Mees. & W. 681; 1 Car. & M. 554, pp. 263, 274, 280, 314, 448, 455.
v. State, 3 Iowa, 550, pp. 155, 157.
- Petch v. Lyon, 9 Q. B. 147, pp. 388, 390, 391.
- Peter c. Watkins, 3 Bing. (N. C.) 421; 4 Scott, 155; 3 Hodges, 25, pp. 273, 274, 517.
- Peterson's Case, 3 Paige, 510, p. 153.
- Peterson, In re, 1 W. W. & H. 418, p. 134.
- Peterson v. Parriott, 4 W. Va. 42, p. 82.
v. Powell, 9 Bing. 620, p. 100.
- Phayre v. Peree, 3 Dowl. 117, p. 463.
- Pheips v. Brewer, 9 Cush. 390, p. 367.
v. Hunt, 4 Conn. 97, pp. 563, 568.
v. Overton, 4 Hayw. 292, p. 469.
v. Preston, 2 La. An. 488, pp. 380, 405.
v. Prew, 3 El. & B. 430; 23 Law J. (Q. B. 140, pp. 294, 296, 300.
v. Worcester, 11 N. H. 51, p. 573.
- Philby c. Hazle, 9 Com. B. N. S. 647; 7 Jur. N. S. 125; 29 Law J. C. P. 370, p. 543.
- Phillips v. Blair, 38 Iowa, 649, p. 453.
v. Bridge, 11 Mass. 242, 246, pp. 476, 481, 495, 498.
v. Dickson, 8 Com. B. N. S. 391; 6 Jur. N. S. 401; 29 Law J. Com. P. 223; 8 Week. R. 390; 2 L. T. N. S. 185; p. 171.
v. Dobbins, 56 Ga. 617, p. 385.
- Phillips, In re, 1 W. W. & H. 418, p. 134.
- Phillips v. Jansen, 2 Esp. 624, p. 246.
v. Overton, 4 Hayw. (Tenn.) 291, p. 464.
v. Pound, 7 Ex. 881; 16 Jur. 645; 21 Law J. Ex. 277, p. 202.
v. Routh, Law R. 7 Com. P. 289, p. 288.
- Phipps v. Danbury, 2 Lown. M. & P. 180; 16 Q. B. 514; 20 Law J. Q. B. 273, p. 540.
- Phoenix Ins. Co. v. Allen, 11 Mich. 501, p. 213.
- Phoenix Life Ins. Co. In re, 1 H. & M. 433; 11 Week. R. 894; 8 L. T. N. S. 728, pp. 575, 618, 619.
- Pickets v. Pearsons, 17 Vt. 470, p. 497.
- Pickett v. Bates, 3 La. An. 627, p. 402.
- Pickford v. Ewington, 4 Dowl. Pr. 453, p. 328.
- Pidgeon v. Williams, 21 Gratt. p. 483.
- Pierce v. Blake, 2 Salk. 515, pp. 151, 497.
v. Strickland, 2 Story, 292, p. 382.
v. Thornton, 4 Ind. 235, pp. 513, 515.
v. Whate, 5 Barn. & C. 39, p. 500.
- Pierson v. Holman, 5 Blackf. 482, pp. 354, 360, 370.
v. Steortz, Morris, 136, p. 319.
- Pigott v. Codman, 1 Hurl. & N. 837; 26 Law J. Ex. 134, p. 543.
- Piggott v. Williams, 6 Mod. 95, p. 486.
- Pike v. Emerson, 5 N. H. 293, pp. 378, 381, 388, 490, 509.
- Pike, In re, 11 Jur. N. S. 504, p. 100.
- Pilgrim v. Hirschfeld, 9 L. T. N. S. 288; 11 Week. R. 51, p. 544.
- Pillsbury v. Dugan, 9 Ohio, 117, pp. 327, 343, 347, 355.
- Pinder v. Morris, 3 Caines, 165, p. 625.
- Pinkerton v. Easton, Law Rep. 16 Eq. 257, p. 611.
- Pinley v. Bagnall, 3 Doug. 155, p. 557.
- Pisani v. Attorney-General, Law R. 5 Priv. C. C. 516; S. C. 10 Moak. Eng. R. 78, p. 460.
- Pitcher v. Monmouth, 2 Marsh. 152, p. 203.
v. Rigby, 9 Price, 83, p. 450.
v. Sheriff, 2 Marsh. 152, p. 202.
- Pitt v. Davinson, 37 Barb. 97, p. 415.
v. Holden, 4 Burr. 2060, p. 483.
v. Pocock, 2 Crompt. & M. 146, p. 203.
v. Yalden, 4 Burr. 2060, pp. 135, 443, 471, 474, 475, 483, 486, 498, 501, 519.
- Pixley v. Butts, 2 Cowen, 421, p. 328.
- Plaintiffs v. Vanderbilt, 1 Abb. Pr. 193, p. 312.
- Planters' Bank v. Homberger, 4 Cold. 578, pp. 568, 581.
- Planters' Bank v. Massey, 2 Heisk. 360, pp. 379, 382, 392.
- Platt, Ex parte, 2 Wall. Jr. 453, p. 580.
- Platt v. Halen, 23 Wend. 456, pp. 557, 417.
- Pleasants v. Kontrecht, 5 Heisk. 694, pp. 430, 625.
- Plitt, Ex parte, 2 Wall. Jr. C. C. 279, 452, pp. 596, 587.
- Plomer v. Houghton, 2 Barn. & Ald. 604, p. 432.
- Plumer v. Gregory, 18 Law R. 621, p. 524.
- Plunkett v. Buchanan, 3 Barn. & C. 736, p. 331.
- Pocock v. O'Shaunessy, 6 Ad. & E. 807, p. 627.
- Poillon v. Martin, 1 Sand. Ch. 569, pp. 457, 465.
- Pollard, In re, 2 Law R. P. C. 106, p. 181.
- Pollard v. Rowland, 2 Blackf. 22, pp. 478, 507.
- Polson v. Young, 37 Iowa, 196, p. 458.
- Poole v. Gist, 4 McCord, 62, 149, pp. 380, 481, 507, 523.
- Poole, In re, 4 Law R. C. P. 350, p. 155.
- Poole v. Watkins, 4 Dowl. 11, p. 184.
- Pope v. Andrews, 9 Car. & P. 564, pp. 388, 394.
- Porter v. Lane, 8 Johns. 357, p. 428.
v. Peckham, 44 Cal. 204, pp. 328, 333, 452, 466, 507.
v. Ruckman, 38 N. Y. 210, pp. 504, 556.
- Portis v. Ennis, 27 Tex. 574, p. 411.
- Post v. Haight, 1 How. 171; 2 Id. 32, pp. 327, 343.
- Potter v. Black, 8 D. P. C. 872, p. 541.

Potter v. Inhabitants of Ware, 1 Cush.
519, p. 228.

v. Mayo, 3 Greenl. 34, pp. 607,
611.

v. Parsons, 14 Iowa, 286, pp. 350,
397, 401.

Potts v. Sparrow, 6 Car. & P. 749, pp.
484, 571.

Poucher v. Norman, 3 Barn. & Cr. 744,
p. 49.

Powell v. Kane, 5 Paige, 265, pp. 178,
232, 233.

v. Spaulding, 3 Greene, 443, p.
355.

Power v. Kent, 1 Cowen, 211, 172, pp.
394, 418, 507, 419, 610, 625.

Prangley, In re, 4 Ad. & E. 781, p. 94.

Frankerd, Ex parte, 3 B. & A. 257, pp.
91, 147.

Pratt v. Gardner, 2 Cush. 68, p. 170.

v. Putnam, 13 Mass. 363, p. 376.

v. Vigard, 5 Barn. & Adol. 808;
2 Nev. & M. 455, pp. 613,
617.

Presider v. Smith, 1 W. W. & H. 51; 2
Jur. 205, p. 539.

Preston v. Carr, 1 Younge & J. 175, p.
288.

v. Hill, 50 Cal. 43; S. C. 19
Am. R. 647, p. 399.

Price v. Bullen, 3 Law J. K. B. 39, pp.
477, 493.

v. Clutterbuck, 1 Fost. & F. 379,
p. 202.

Price, Ex parte, 2 Ves. Sr. 407, pp. 607,
610, 612.

Price v. Grand Rapids R. R. 18 Ind.
139, pp. 454, 466.

v. Hickok, 39 Vt. 292, p. 350.

Prickett, Ex parte, 1 N. R. 266, pp. 539,
545.

Priestwick v. Poley, 34 Law J. Com.
P. 189; 18 Com. B. N. S. 606, pp. 393,
395.

Prince v. Griffin, 16 Iowa, 552, p. 308.

Prior v. Moore, 6 Maule & S. 605, pp.
97, 200.

Pritchard v. Roe, 8 Car. & P. 99, p. 290.

Proprietors v. Bishop, 2 Vt. 231, pp. 327,
329.

Prothers v. Thomas, 1 Marsh. 539; 6
Taunt. 196, p. 545.

Prouse's Case. Croke Car. 389, pp. 197,
198, 203.

Prouty v. Eaton, 41 Barb. 409, p. 277.

Pruit v. Miller, 3 Ind. 16, p. 256.

Pulbrook, In re, Law R. 4 Ch. 627, p.
615.

Pulver v. Harris, 53 N. Y. 73, p. 607.

Purchase v. Bellows, 16 Abb. Pr. 105,
p. 627.

Purvis v. Landall, 12 Clark & F. 91, pp.
475, 483, 484, 492.

Putnam v. Van Buren, 7 How. 31, pp.
426, 438.

Pye v. Leigh, 2 Wm. Black. 1065, pp.
202, 203.

Pyke's Case, 6 Best & Smith, 703, p.
155.

Q.

Quarles v. Porter, 12 Mo. 76, p. 382.

v. Waldron, 20 Ala. 217, p. 225.

Quarrier, Ex parte, 4 W. Va. 210, p. 68.

Quested v. Lallis, 10 Mees. & W. 18; 1

Dowl. N. S. 888; 11 Law J. N. S. Ex.
345, pp. 609, 625, 629.

Quick, Ex parte, 2 Scott, 184; 1 Hodges,
202, p. 544.

Quimby v. Quimby, 6 N. H. 79, p. 625.

Quinn v. Lloyd, 36 How. 378, pp. 364,
387, 410.

v. Weatherbee, 41 Cal. 247, p.
478.

Quint v. Ophir Co. 4 Nev. 304, pp. 568,
574, 699.

R.

Radcliffe v. Pursman, 2 Br. P. C. C. 514,
p. 292.

Rader v. Snyder, 3 W. Va. 414, pp. 81,
82.

Ramsbotham v. Senior, Law R. 8 Eq.
575, p. 295.

Ramsey's Devises v. Erie R. R. Co.,
Abb. Pr. 174, p. 221.

Ramsey's Devises v. Trent, 10 B. Mon.
336, p. 587.

Randall v. Brigham, 7 Wall. 523, pp.
143, 170.

v. Ikey, 4 Dowl. 682, p. 571.

v. Key, 4 Dowl. 682, p. 506.

Randle v. Fuller, 6 Term. Rep. 456, pp.
607, 610, 627.

Raneleigh v. Thornhill, 1 Vern. 202, p.
558.

Rankin v. McDowell, 2 Marsh. 621, p.
558.

Ransome v. Christian, 56 Ga. 353, p. 213.

Ransom, In re, 18 Beav. 220, p. 539.

Ranson v. Cothran, 6 Smedes & M. 167,
pp. 491, 502.

Rasquin v. Knickerbocker Stage Co.
21 How. Pr. 293, p. 623.

Rastrick v. Beckwith, 2 Dowl. & L. 624;
8 Scott N. R. 716; 7 Man. & G. 905; 3

Jur. 1030; 14 Law J. Com. P. 1, p. 204.

Ratcliff v. Baird, 14 Tex. 43, pp. 421, 600.

Rathbun v. Ingalls, 7 Wend. 320, pp.
447, 456, 511, 513, 515.

Rawling v. Sewell, 7 Scott, 231, p. 627.

Ray v. Adden, 50 N. H. 82; S. C. 9 Am.
R. 175, p. 573.

v. Birdseye, 5 Denio, 619; S. C. 4
Hill, 158, p. 498.

Raynor v. Ritson, 6 Best & Smith, 888,
p. 289.

Reader v. Bloom, 3 Bing. 9, pp. 82, 99,
100.

Read v. Dupper, 6 Term. Rep. pp. 607,
609, 610, 612.

v. French, 28 N. Y. 293, pp. 376,
410, 412, 414, 625, 629.

v. Passer, 1 Esp. 216; Peake, 231,
p. 297.

Redfern v. Lowerby, 1 Swanst. 84, p. 616.

- Redit v. Brownhead*, 2 Bos. & P. 564, p. 219.
- Reece v. Rigby*, 4 Barn. & Ald. 202, pp. 445, 448, 475, 477, 481, 487, 490, 493, 494, 499, 500.
- Reed v. Curry*, 35 Ill. 536, p. 370.
v. Norris, 2 Mylne & C. 374, p. 466.
- Reeve v. Kennedy*, 43 Cal. 649, p. 360.
v. Palmer, 5 Com. B. N. S. 84, pp. 426, 473.
- Reg. v. Avery*, 8 Car. & P. 596, p. 320.
v. Buchanan, 8 Q. B. 883, p. 96.
v. Burgess, 3 Nev. & P. 366, p. 99.
v. Cumberland, 5 Rail. C. 332; 5 Dowl. & L.; 10 Jur. 1025; 17 Law. J. Q. B. 102, p. 334.
v. Farley, 2 Car. & K. 313, p. 320.
v. Haywood, 2 Str. 1100, p. 325.
v. Jones, 1 Den. C. C. 166; Car. & K. 234, p. 283.
v. Litchfield, 10 Q. B. 534; 11 Jur. 888; 16 Law J. Q. B. 333, pp. 334, 564.
v. Maybury, 11 L. T. N. S. 566, p. 53.
v. Tanner, 2 Ld. Raym. 1284, p. 325.
- Reid v. Dickinson*, 37 Iowa, 56, p. 413.
- Reigal v. Wood*, 1 Johns. Ch. 44, pp. 158, 177, 410.
- Reinhold v. Alberti*, 1 Binn. 469, pp. 374, 378.
- Republic of Mexico v. De Arangoiz*, 5 Du. 643, pp. 346, 347.
- Respublica v. Oswald*, 1 Dall. 328, p. 184.
- Respublica v. Fisher*, 1 Yeates, 350, p. 198.
- Revett v. Harvey*, 1 Sim. & St. 502, p. 463.
- Revill v. Pettitt*, 3 Met. (Ky.) 314, pp. 202, 242.
- Rex v. Back*, 9 Price, 349, p. 147.
v. Barnards, In re, 5 Ad. & E. 17, p. 25.
v. Bennett, Sayers, 169, pp. 135, 486, 488.
v. Carlisle, 3 Barn. & Ald. 167, p. 217.
v. Collingridge, 3 Price, 280, pp. 539, 545.
v. Creavey, 1 Maule & S. 273, p. 217.
v. Crossley, 2 Esp. 576, pp. 499, 500, 562.
v. Dixon, 3 Burr, 1670, pp. 290, 273, 319, 320.
v. Duchess Kingston, 20 How. St. Tr. 612, p. 319.
v. Farley, 1 Den. C. C. 197, p. 308.
v. Fielding, 2 Curr. 654, p. 135.
v. Gilham, 6 T. R. 265, p. 44.
v. Gray's Inn, Doug. 353, p. 23.
v. Hales, 2 Strange, 816, p. 325.
v. Haycock, Strange, 1100, p. 325.
v. Hill, 7 Price, 630, p. 405.
v. Lincoln's Inn, 4 Barn. & C. 835, p. 25.
v. London, 2 Barn. & Adol. 604, p. 427.
- Rex v. Middlesex*, 2 D. P. C. 147, pp. 427, 431.
v. Partridge, 1 Tidd's Pr. 330, p. 545.
v. Sankey, 6 Nev. & M. 839; 1 Doug. 104, p. 614.
v. Sheriffs, 2 Barn. & Ald. 604, p. 433.
v. Smith, 1 Phill. Ev. 132, p. 270.
v. Southerton, 6 East, 142, pp. 147, 151.
v. Tew, Sayers, 50, pp. 135, 486, 487, 488, 494.
v. Tilney, 18 Law J. N. S. M. C. 36, p. 320.
v. Vaughn, 1 Wilk. 22, pp. 148, 152.
v. White, 1 Ryan & M. 166, p. 20.
v. Williams, 2 Har. & W. 277, p. 674.
v. Withers, 2 Camp. 578, pp. 274, 290, 311.
- Reynolds v. Caswell*, 4 Taunt. 193, p. 542.
v. Howell, Law Rep. 8 Q. B. 398, pp. 345, 355, 369.
v. McMillan, 63 Ill. 46, p. 574.
v. Sprye, 10 Beav. 51, p. 314.
- Rhines v. Evans*, 66 Pa. 195, pp. 530, 446, 479, 487, 494.
- Rhodes, Ex parte*, 15 Ves. Jr. 72, 539, p. 608.
- Rhodes v. Selim*, 4 Wash. C. C. 718, p. 516.
- Rice v. Commonwealth*, 18 B. Mon. 472, pp. 81, 142, 155, 472, 441.
v. Rice, 14 Mon. 417, p. 289.
v. Wilkins, 21 Me. 558, p. 382.
- Richardson v. Brooklyn City*, 24 How. Pr. 321, p. 623.
v. Rowland, 40 Com. B. 565, p. 589.
v. Talbot, 2 Bibb, 282, pp. 420, 424, 426.
- Richards v. French*, 32 Law T. N. S. 327, p. 464.
v. Platet, Craig & P. 458, p. 615.
v. Suffield, 2 Ex. 616, p. 98.
- Ricketson v. Compton*, 23 Cal. 637, pp. 343, 367.
- Ricketts v. Gurney*, 1 Chit. 682; 7 Price, 699, p. 200.
- Riddle v. Hoffman's Ex.* 3 Pa. 224, pp. 478, 526.
v. Poorman, 3 Pa. 224, pp. 480, 481.
- Ridgley v. Steamer Reindeer*, 27 Mo. 442, p. 485.
- Ridley v. Tiplady*, 20 Beav. 44, p. 491.
- Riggs v. Denniston*, 3 Johns. Cas. 198, pp. 285, 676.
- Rigley v. Dakin*, 2 Younge & J. 83, 150, p. 558.
- Rigley, Ex parte*, 11 L. T. N. S. 671, p. 88.
- Ripley v. Bull*, 19 Conn. 56, p. 583.
- Ripon v. Davis*, 2 Nev. & M. 210, p. 311.
- Risley v. Fellows*, 10 Ill. 531, p. 438.
- Rob v. Moffatt*, 3 Johns. Rep. 257, p. 238.

- Robb *v.* Smith, 3 Scam. 46, pp. 81, 124.
 Roberts *v.* Caster, 38 N. Y. 107, p. 627.
 v. Gresley, 3 Car. & P. 380, p. 393.
 v. Harris, 32 Ga. 542, p. 378.
 v. Lucas, 11 Ex. 41; 1 Jur. N. S. 527, pp. 527, 540.
 v. Mackoul, 2 W. Black. 827, p. 608.
 v. Mason, 1 Taunt. 254, pp. 200, 204.
 Robertson *v.* Marriott, 2 Crompt. & M. 183, p. 517.
 v. McClellan, 1 How. 90, p. 435.
 v. Mills, 1 Dowl. N. S. 772; 6 Jur. 896, p. 179.
 v. Shutts, 9 Bush. 660, p. 628.
 Robbins *v.* Harvey, 5 Conn. 335, p. 563.
 Robins *v.* Bridge, 3 Mees. & W. 119, p. 229.
 Robins, *In re*, 11 Jur. N. S. 504, pp. 100, 155.
 Robinson *v.* Anderson, 28 Beav. 98, aff'd on appeal, 7 De Gex, M. & G. 239, p. 331.
 v. Danchy, 3 Barb. 20, p. 228.
 Robinson, *Ex parte*, 2 Dowl. & L. 9, pp. 98, 187.
 Robinson *v.* Flight, 8 London Jurist, 888, p. 263.
 v. Mullett, 4 Price, 353, p. 517.
 v. Rowland, 4 Dowl. 271, p. 562.
 v. Ward, 1 Ryan & M. 274, p. 456.
 Robson *v.* Eaton, 1 T. R. 62, pp. 347, 368.
 v. Kemp, 4 Esp. 235; 5 Esp. 52, pp. 274, 306, 307, 313.
 Rochester *v.* Bank, 5 How. Pr. 259, p. 318.
 Rochester Bank *v.* Suydam, 5 How. Pr. 254, pp. 278, 279.
 Rogers *v.* Dare, Wright, 136, p. 516.
 Rogers, *Ex parte*, 11 Jur. N. S. 504, p. 87.
 Rogers *v.* Greenwood, 14 Minn. 333, p. 389.
 v. Lyons, 64 Barb. 373, p. 297.
 v. Reeves, 1 T. R. 422, p. 139.
 Rolfe *v.* Rogers, 4 Taunt. 191, pp. 490, 509, 178.
 Rolland *v.* Hart, 6 Law R. Ch. 678, p. 408.
 Rolles *v.* Germaine, Cro. Eliz. 459, p. 58.
 Roman *v.* Mali, 42 Ind. 513, p. 459.
 Rootes *v.* Stone, 2 Leigh, 650, p. 476.
 Rooney *v.* R. R. 18 N. Y. 368, pp. 610, 625, 626.
 Roscoe *v.* Hardman, 5 D. P. C. 157; 2 Har. & W. 118, pp. 173, 175.
 Rose *v.* Gerrish, 8 Allen, 147, p. 510.
 v. Minell, 7 Yerg. 30, pp. 451, 464, 486.
 v. Minett, 7 Yerg. 930, p. 182.
 v. Spier, 44 Mo. 20, p. 576.
 Roselins *v.* De La Chaise, 5 La An. 482, pp. 565, 466, 567.
 Ross *v.* Gibbs, Law R. 8 Eq. 522, pp. 285, 291.
 v. Laughton, 1 Ves. & B. 349, pp. 619, 621, 622, 624.
 v. Sterling, 4 Dow, 442, pp. 468, 445.
 v. Wilton, 7 Jur. 1133; 13 Law J. Q. B. 17, p. 546.
 Rothery *v.* Munnings, 1 Barn. & Adol. 17, p. 437.
 Rouffigny *v.* Peale, 3 Taunt. 484, pp. 477, 481, 493.
 Rowbottom *v.* Duffree, 5 Dowl. P. C. 557, p. 526.
 Rowland, *Ex parte*, 3 Jur. 1193, p. 94.
 Rowland *v.* Stone, 58 Pa. 196, p. 402.
 Rowle, *Ex parte*, 2 Chit. 61, p. 86.
 Rowson *v.* Earle, M. & M. 538, pp. 437, 521, 526, 571, 603, 491.
 Rowth *v.* Stowell, 3 Ves. 656, p. 456.
 R. R. Co. *v.* Byers, 8 Casey, 22, p. 487.
 Rubenstein *v.* ———, 10 Ir. C. L. R. 386, p. 52.
 Rudge, *Ex parte*, 2 Dowl. N. S. 682, p. 98.
 Runyon *v.* Nichols, 11 Johns. 547, pp. 486, 556, 571.
 Rush *v.* Cavanaugh, 2 Pa. 189, pp. 247, 588.
 v. Larue, 4 Litt. 411, pp. 163, 164.
 Russell's Case, Say. 125, p. 619.
 Russell *v.* County, 29 Iowa, 256, p. 363.
 v. Jackson, 9 Hare, 378, pp. 301, 302, 303, 313.
 v. Lane, 1 Barb. 516, p. 373.
 Russell *v.* Palmer, 2 Wils. 325, pp. 474, 476, 481, 486, 487, 498, 499, 500, 519, 528.
 Russell *v.* Stewart, 3 Burr. 1787, pp. 481, 498.
 Russell, Trial of Lord, 9 State Trials, 578, p. 18.
 Russell *v.* Reece, 2 Car. & K. 669, p. 137.
 Rust *v.* Frothingham, Breese, 260, p. 367.
 v. Larue, 4 Litt. 411, pp. 549, 558, 580, 587.
 Ryalls *v.* Leader, Law R. 1 Ex. 246, p. 217.
 Ryan *v.* Doyle, 31 Iowa, 53, pp. 355, 363.
 Ryckman *v.* Coleman, 13 Abb. Pr. 398, pp. 218, 220.
 Ryland *v.* Noakes, 1 Taunt. 342, pp. 426, 427, 432, 435, 438.

S.

- Sabin *v.* De Burgh, 2 Camp. 196, p. 97.
 Saffery, *In re*, 11 Week. R. 779, p. 94.
 Saidler *v.* Elliott, 3 Barn. & C. 738, p. 474.
 Salisbury *v.* Tongas, 10 Met. 442, pp. 469, 497, 509.
 Salt *v.* Carr, Car. & M. 123, p. 318.
 Sample *v.* Frost, 10 Iowa, 266, p. 279.
 Sampson *v.* Obleyer, 22 Cal. 200, pp. 386, 375.
 Samuel *v.* Isaacs, 2 Lond. Jur. 858, p. 138.

- Sanchez v. Roach*, 5 Cal. 248, p. 438.
Sanderson v. Caldwell, 45 N. Y. 398; S. C. 6 American Rep. 105, p. 245.
Sands v. Trevilian, Cro. Car. 107, pp. 559, 563.
Sanford v. Bennett, 24 N. Y. 20, p. 217.
 v. Remington, 2 Ves. 189, pp. 266, 299, 309, 315.
 v. Ruckman, 24 How. Pr. 521, p. 556.
Sargeant v. Gannon, 7 Com. B. 742; 6 Dowl. & L. 691; 18 Law J. C. P. 220, p. 542.
Sargent v. Hampden, 38 Me. 581, pp. 254, 268.
 v. Pettibone, 1 Aiken, 355, pp. 230, 232, 234.
Satterlee v. Bliss, 36 Cal. 489, pp. 277, 279, 281.
 v. Frazer, 2 Sand. 141, pp. 513, 558, 580, 588, 589.
 v. Mathewson, 2 Peters, 380, p. 69.
Saunderson v. Glass, 2 Atk. 298, p. 459.
Saunders v. McCarthy, 8 Allen 42, p. 390.
Savory v. Chapman, 8 Dowl. 656, pp. 380, 383, 409, 423.
 v. King, 5 H. L. Cas. 627; 2 Jur. N. S. 503, pp. 463, 465.
 v. Savory, 8 Iowa, 217, p. 343.
 v. Sypher, 6 Wall. 157, p. 382.
Savings Bank v. Benton, 2 Met. (Ky.) 240, pp. 565, 566.
Savings Institution v. Chinn's Admr. 7 Bush, 539, pp. 384, 402.
Sawyer v. Birchmore, 3 Mylne & K. 572, p. 318.
Saxon v. Blake, 29 Beav. 438, p. 137.
 v. Castle, 6 Ad. & E. 652, p. 240.
Saxon v. Stowell, 11 Paige, 526, pp. 135, 155, 156, 184.
 v. Wyckoff, 6 Paige, 182, p. 173.
Say v. Seal's Case, 10 Mod. 40, p. 306.
Sayers, Ex parte, 10 L. R. C. P. 638, p. 96.
Scarfe v. Morgan, 4 Mees. & W. 285, pp. 612, 621.
Schenk, Ex parte, 65 N. C. 353, p. 148.
Schoole v. Noble, 1 H. Black. 23, pp. 608, 628.
Schirling v. Scites, 41 Miss. 644, p. 367.
Schroudenbeck v. Phoenix Ins. Co., 15 Wis. 632, pp. 334, 343, 354.
Schwalbanker, Ex parte, 1 Dowl. O. S. 182, pp. 176, 137.
Scobey v. Ross, 5 Ind. 445, pp. 556, 590.
Scott's Admr. v. Wickliffe, 1 B. Mon. 353, p. 445.
Scott v. Eaton, 26 Ark. 17, p. 358.
 v. Elmendorf, 12 Johns. 315, pp. 374, 558, 563.
 v. Harmon, 109 Mass. 237, p. 165.
 v. Hoxie, 13 Vt. 50, p. 422.
 v. Newington, 1 Macl. & R. 252, p. 621.
 v. Seiler, 5 Watts, 235, pp. 410, 415.
Scott v. Stansfield, 3 L. R. Ex. 220, p. 170.
 v. Van Alstyne, 9 Johns. 216, pp. 199, 205.
Scranton v. Stewart, 52 Ind. 68, p. 271.
Seaman v. Dee, 2 Lev. 39; 1 Vent. 198, p. 210.
Seaman, Ex parte, 3 Hurl. & C. 148; 10 Jur. N. S. 592; 33 Law J. Ex. 204; 12 Week. R. 748; 10 L. T. N. S. 345, p. 612.
Secombe, Ex parte, 19 How. U. S. 9, pp. 66, 141, 181.
Secor v. Bell, 18 Johns. 52, p. 199.
Sedgworth v. Spicer, 4 East. 569, p. 139.
Sedgwick v. Stanton, 14 N. Y. 289, pp. 164, 588.
Sedley v. Sutherland, 3 Esp. 202, pp. 239, 241, 501.
Seely v. Crane, 3 Green, 35, pp. 548, 549, 563.
 v. North, 16 Conn. 92, p. 565.
Seewood, Ex parte, 8 Jur. 404, p. 98.
Seives v. Hamilton, 6 Iowa, 149, p. 453.
Seiple v. Atkinson, 64 Mo. 504, p. 423.
Senrice v. Parker, Rep. Temp. Finch, 75, p. 588.
Serace v. Whittington, 2 Barn. & C. 11, pp. 236, 421, 558.
Sergeant's Case, 8 Scott, 430, pp. 47, 48.
Sevier v. Holliday, 2 Ark. 512, p. 510.
Sewell, Ex parte, 32 Beav. 475, p. 98.
Sewell v. Allen, 17 L. J. Ex. 246, p. 467.
Sexton v. Pike, 13 Ark. 193, p. 610.
Seymour v. Ellison, 2 Cowen, 13, pp. 81, 73.
Shapely v. Bellows, 4 N. H. 355, p. 594.
Sharp v. Carter, 3 P. Wms. 375, p. 163.
Sharp, Ex parte, 5 Dowl. & S. 717, p. 174.
Sharp v. Hawker, 3 Scott, 396, pp. 160, 133.
 v. Mayor, 31 Barb. 578, p. 478.
Sharpe v. Foy, 17 Week. R. 65, p. 408.
Sharpe, In re, 1 Dowl. 432, pp. 614, 617.
Shaughnessy v. Foggs, 15 La. An. 330, p. 277.
Shaw v. Arden, 9 Bing. 287; 2 Moore & S. 341, pp. 505, 557, 571.
 v. Kidder, 2 How. Pr. 244, pp. 379, 396, 397.
 v. Neale, 6 H. L. Cas. 581; 4 Jur. N. S. 695; 27 Law J. Ch. 444, pp. 171, 607.
Shaves v. Norris, Pen. (N. J.) 63, p. 549.
Sheldon v. Ricedorph, 25 Minn. 518, p. 408.
Shellars v. Harris, 5 Car. & P. 592, p. 254.
Shelton v. Tiffen, 6 How. 163, pp. 355, 358, 360, 363.
 v. Pendleton, 18 Conn. 421, p. 460.
Shepherd v. Mackoul, 3 Cowp. 326, p. 563.
Sherman v. State, 4 Kan. 570, p. 235.
Sherrard v. Nevine, 2 Ind. 241, p. 356.
Sherry, In re, 3 Law R. Q. B. 164, p. 85.
Sherwood, Ex parte, 7 Moore, 493, p. 97.

- Sherwood, In re, 3 Beav. 338, p. 562.
 Sherwood v. Saratoga R. R. Co. 15 Barb. 650, pp. 221, 454, 455, 625.
 Shillcock v. Passman, 7 Car. & P. 289, p. 484.
 Shiller v. Davidson, 4 La. An. 171, p. 501.
 Shipden, Ex parte, 6 Dowl. & R. 338, pp. 134, 174.
 Shire v. King, Yel. 82, p. 220.
 Shore v. Bedford, 5 Man. & G. 271, pp. 275, 290, 455, 263, 448.
 Shores v. Cresswell, 13 Met. 413, p. 381.
 Shorman v. Allen, 1 Man. & Gr. 96, p. 335.
 Short v. King, 2 Strange, 681, p. 312.
 v. McCarthy, 3 Barn. & Ald. 629, pp. 498, 530.
 v. Pratt, 1 Bing. 102, pp. 148, 157.
 v. Smith, 1 Man. & G. 211; 8 D. P. C. 584; 1 Scott N. R. 155, pp. 183, 184.
 Shorter, In re, Dist. Court Ala. p. 68.
 Shumaway v. Stillman, 6 Wend. 453, pp. 355, 356, 358.
 Sidney, Algernon, Trial of, 9 St. Tr. 817, p. 18.
 Sigourney v. Waddle, 9 Page, 381, p. 220.
 Silkman v. Boiger, 4 E. D. Smith, 236, p. 343.
 Sill, In re, 2 Jur. N. S. 1232, p. 100.
 Sill v. Thomas, 8 Car. & P. 762, p. 571.
 Silves v. Ely, 3 Watts & S. 120, pp. 410, 412.
 Simes v. Gibbs, 1 W. W. & H. 401, p. 134.
 Simmons v. Almy, 103 Mass. 33, pp. 619, 625.
 v. Bradford, 15 Mass. 82, pp. 495, 498.
 v. Rose, 31 Beav. 1, pp. 497, 507, 527.
 v. State, 12 Mo. 268, p. 75.
 Simms v. Brutton, 5 Ex. 802; 20 Law J. Ex. 41, p. 381.
 Sims v. Brown, 6 Thomp. & C. 5, p. 515.
 Simpson v. Brown, 33 Beav. 483, p. 264.
 v. Lamb, 7 El. & B. 84, pp. 458, 463, 465, 579, 626.
 v. Lombas, 14 La. An. 103, p. 385.
 Simpson, Ex parte, 15 Ves. Jr. 476, p. 178.
 Simpson, In re, 1 Com. B. N. S. 554, p. 167.
 Skapholm v. Hart, 15 Vin. Abr. 171, p. 164.
 Skillen v. Wallace, 36 Ind. 319, p. 503.
 Skinner v. Sweet, 3 Madd. 244, pp. 607, 609, 610.
 Skirrow v. Tagg, 5 Maule & S. 281, pp. 197, 198.
 Slaughter-House Cases, 16 Wall. 36, p. 78.
 Slocum v. Newby, 1 Murph. 423, p. 228.
 Sloman v. Herne, 2 Esp. 695, p. 263.
 v. Loudon, 396, p. 269.
 Sloo v. Law, 4 Blatchf. C. C. 268, pp. 428, 430.
 Smallwood v. Norton, 20 Me. 80, p. 527.
 Smedes v. Elmendorf, 3 Johns. 185, pp. 476, 487, 493, 497.
 Smith v. Andrews, 1 Roll. Abr. 54, p. 40.
 v. Bossard, 2 McCord, 406, pp. 236, 375, 405.
 v. Bowditch, 7 Pick. 138, pp. 229, 230, 367.
 v. Brocklesburg, 1 Anstr. 61, p. 628.
 v. Brotherline, 62 Pa. 461, p. 442.
 v. Chichester, 2 Dru. & War. 293, p. 613.
 v. Daniels, Law Rep. 18 Eq. 647, pp. 278, 319.
 v. Davis, 45 N. H. 566, pp. 556, 573, 574.
 v. Demies, 7 Dowl. & L. 78; 5 Ex. 32; 13 Jur. 518; 19 Law J. Ex. 60, p. 539.
 v. Dougherty, 37 Vt. 530, p. 568.
 v. Fell, 1 Curt. 667, p. 286.
 v. Ganisford, 1 Rose, 148, pp. 236, 502.
 v. Gillett, 3 Dowl. 364, pp. 151, 154.
 v. Hill, 8 Eng. Ark. 173, p. 524.
 v. Holding, 1 McCord, 379, pp. 148, 150, 155.
 v. Lipscomb, 13 Tex. 537, pp. 419, 420.
 v. Lyford, 11 Shep. 147, pp. 562, 565.
 v. Matham, 4 Dowl. & R. 738, p. 147.
 v. Millikin, 2 Minn. 319, pp. 377, 388.
 v. Pocock, 23 Eng. Law & Eq. 420, pp. 511, 517, 520.
 v. Rolt, 2 D. P. C. 21, pp. 505, 571.
 v. State, 1 Yerg. 228, pp. 147, 155, 158, 159.
 v. Tennessee, 1 Yerg. 228, pp. 152, 153.
 v. Thompson's Heirs, 7 B. Mon. 308, pp. 451, 459, 465.
 v. Tower, 2 Dowl. 673, p. 151.
 v. Wattleworth, 4 Barn. & C. 364; 6 Dowl. & R. 510; 1 Car. & P. 615, p. 545.
 v. Wilson, 2 Dowl. 665, pp. 82, 99.
 v. Winter, 18 Week. R. 447, p. 609.
 Smith's Case, 1 Brod. & B. 522, p. 141.
 Smith, Ex parte, 12 Fla. 278, pp. 86, 98, 141, 152, 153, 166, 167, 178, 548.
 Smithers, Ex parte, 1 Arms. 423, p. 95.
 Smithwick v. Evans, 124 Ga. 461, p. 277.
 Smock v. Dale, 5 Rand. 639, pp. 398, 403, 411.
 Smyth v. Harris, 31 Ill. 62, pp. 416, 425, 507, 525.
 Snelling, Ex parte, 44 Cal. 553, p. 123.
 Solomon, Ex parte, 1 Glyn & J. 25, p. 621.
 Somers v. Balabrega, 1 Dall. 164, pp. 375, 423.
 Sommers v. Torrey, 5 Paige, 54, p. 178.
 Souter v. Watts, 2 Dowl. 263, p. 368.

- South Staffordshire R. R. Co. v. Smith, 1 Lown. M. & P. 515; 19 Law J. Ex. 356, p. 104.
 Sowell v. Champion, 6 Ad. & E. 407, pp. 240, 242.
 Spaight v. Cowne, 1 Hem. & M. 359, p. 467.
 Spangel v. Dellinger, 42 Cal. 148, p. 366.
 Spark v. Spicer, 1 Ld. Raym. 322, 738, pp. 607, 614.
 Sparks v. Middleton, 1 Keb. 505, pp. 253, 257.
 Spears v. Hartley, 3 Esp. 81, p. 614.
 v. Ledgerber, 65 Me. 465, p. 397.
 Spenceley v. Schulenberg, 7 East, 357, pp. 263, 282, 299, 309, 311.
 Spencer, In re, 18 W. R. Ch. 240, pp. 476, 483, 493.
 Spiller v. Davidson, 4 La. An. 171, p. 483.
 Spinks v. Davis, 32 Miss. 152, pp. 224, 455.
 Sprague v. Baker, 17 Mass. 586, pp. 493, 518.
 Springer v. Whipple, 17 Me. 351, p. 381.
 Spurrier v. Allen, 2 Car. & K. 210, p. 570.
 Spyer v. Bernard, 8 L. T. N. S. 396, p. 540.
 Staats, Ex parte, 4 Cowen, 76, p. 176.
 Stackhouse v. O'Hara, 14 Pa. 88, pp. 899, 401, 423.
 Stafford v. Richardson, 15 Wend. 305, p. 446.
 St. Albans v. Bush, 4 Vt. 58, pp. 343, 562.
 Staley v. Dodge, 50 Ill. 43, p. 457.
 Standage v. Creighton, 5 Car. & P. 406, pp. 393, 394.
 Standard v. Ullithorne, 10 Bing. 491, pp. 492, 497, 508, 519, 520.
 Standefer v. Dowlin, Hemp. 209, p. 343.
 Stanley v. Jones, 7 Bing. 349, pp. 164, 165, 166.
 Stanton v. Haskin, 1 McArthur. 561, pp. 164, 165, 580.
 Staples v. Staples, 4 Greenl. 535, p. 514.
 Starbuck v. Murray, 5 Wend. 148, p. 356.
 Starke v. Kenan, 11 Ala. 819, p. 378.
 Starr v. Vanderheyden, 9 Johns. 253, pp. 141, 173, 441, 451.
 Starving v. Cousins, 1 Gale, 159, p. 563.
 St. Aubyn v. Smart, 5 Law R. Eq. 183, p. 524.
 State v. Anderson, 40 Iowa, 207, p. 181.
 v. Bradley, 6 La. An. 556, p. 324.
 v. Carothers, 1 Greene, 464, p. 343.
 v. Chapman, 11 Ohio, 430, pp. 141, 149.
 v. Chitty, 1 Bail. 379, p. 162.
 v. Collins, 70 N. C. 241, p. 215.
 v. Cook, 23 La. An. 347, p. 226.
 v. Ferris, 16 La. An. 424, p. 324.
 v. Fields, 1 Mart. & Y. 70, p. 152.
 v. Foreman, 3 Mo. 602, p. 156.
 v. Galaxy, 5 Ohio, 14, p. 79.
 v. Garesche, 36 Mo. 256, pp. 68, 75, 81.
 State v. Haddon, 8 D. P. C. 995, p. 137.
 v. Hamilton, 55 Mo. 520, p. 210.
 v. Hawkins, 28 Mo. 366, p. 373.
 v. Hazleton, 15 La. An. 72, p. 271.
 v. Houston, 3 Har. (Del.) 15, pp. 343, 370.
 v. King, 21 La. An. 201, p. 79.
 v. Kirk, 12 Fla. 278, p. 146.
 v. Lassiter, 70 N. C. 462, p. 212.
 v. McKinney, 42 Iowa, 205, p. 275.
 v. Robinson, 26 Tex. 367, p. 159.
 v. Romero, 5 La. An. 24, p. 324.
 v. Start, 7 Iowa, 499, p. 155.
 v. Smart, 1 Iowa, 499, p. 142.
 v. Squires, 1 Tyler, 147, pp. 296, 319.
 v. Tilghman, 6 Iowa, 496, p. 344.
 v. Wailes, 12 La. An. 243, p. 79.
 v. Waltham, 48 Mo. 55, p. 210.
 v. Watkins, 3 Mo. 388, 159, p. 155.
 v. Williams, 6 N. C. 505, p. 212.
 Steele, In re, 10 Jur. N. S. 4, 125, p. 96.
 Stephens v. Babcock, 3 Barn. & Adol. 357, p. 418.
 v. Gagwell, 15 Ves. 139, p. 164.
 v. Farrar, 4 Bush, 13, p. 628.
 v. Hill, 10 Mees. & W. 28, pp. 148, 152, 157.
 v. Monges, 1 Harris, 127, pp. 549, 556, 558.
 v. Walker, 55 Ill. 151, pp. 474, 480.
 v. White, 2 Wash. (Va.) 203, pp. 482, 485, 503, 521, 522.
 v. Roe, 37 Ga. 289, p. 268.
 Stevens v. Adams, 23 Wend. 57, pp. 549, 559.
 v. Fuller, 55 N. H. 443, p. 343.
 v. Walker, 55 Ill. 151, pp. 483, 487.
 v. Weston, 5 Dowl. & R. 399; 3 Barn. & C. 530, p. 628.
 Slevenson v. Berwick, 1 Q. B. 154, p. 562.
 v. Blacklock, 1 Maule & S. 535, pp. 612, 613, 615, 616, 618, 622.
 v. Power, 9 Price, 384; Jur. 198, pp. 183, 184, 185.
 v. Stevenson, 3 Edw. 340, pp. 428, 429.
 Stewart v. Common Pleas, 10 Wend. 597, p. 435.
 Stewart, Ex parte, 7 L. R. Ex. 202, p. 96.
 Stewart v. Flowers, 44 Miss. 513, p. 615.
 Stewart, In re, 2 L. R. P. C. 88, p. 150.
 Stewart v. Potts, 49 Miss. 749, p. 79.
 Still v. Thomas, 8 Car. & P. 428, p. 559.
 Stimpson v. Sprague, 6 Mc. 470, p. 522.
 Stirling, Ex parte, 16 Ves. 259, pp. 612, 613, 615, 618.
 Stockton v. Ford, 11 How. 247, pp. 451, 462, 468.
 Stockley v. Hornidge, 8 Car. & P. 16, p. 239.
 Stokely v. Robinson, 31 Pa. 318, pp. 397, 399, 403, 404, 405.
 Stokes, Ex parte, 1 Chit. 536, p. 93.

- Stokes *v.* Geddes, 46 Cal. 17, p. 360.
 v. Trumper, 2 Kay & J. 232, pp. 491, 541, 556.
 v. White, 1 Crompt. M. & R. 223, p. 240.
 Stones *v.* Bacon, 4 Dowl. & L. 393, p. 52.
 Stone's Case, 1 Vent. 16, 29, pp. 197, 198.
 Stone *v.* Stone, 4 Taunt. 601, p. 136.
 Story *v.* Vanderheyden, 9 Johns. 253, pp. 465, 468.
 Stow *v.* Hamlin, 1 How. Pr. 425, pp. 568, 576.
 Stracy *v.* Blake, 1 Mees. & W. 168, p. 398.
 Stratford, *Ex parte*, 12 L. J. Q. B. 231, p. 154.
 Stratford *v.* Hogan, 2 Ball & B. 164, p. 267.
 Stratton *v.* Hussey, 62 Me. 286, pp. 610, 628.
 Strauss *v.* Francis, Law R. 1 Q. B. 379; S. C. 7 B. & S. 365, pp. 393, 395, 397.
 Stretton, *In re*, 14 Mees. & W. 806, pp. 570, 575, 589.
 Strippleman *v.* Clark, 11 Tex. 298, p. 75.
 Strodes *v.* Seyton, 2 Ad. & E. 171, p. 254.
 Strong *v.* Dickinson, 5 D. P. C. 86; 1 Mees. & W. 488; 2 Gale & D. 83, p. 201.
 v. Howard, Str. 621, pp. 619, 620.
 Strothers, *In re*, 3 Kay & J. 518; 3 Jur. N. S. 736; 26 Law J. Ch. 695, p. 539.
 Stubbs *v.* Beene, 37 Ala. 627, pp. 483, 526.
 Study *v.* Sanders, 2 Dowl. & R. 347, 262, 282, 298, 310, 319.
 Sturdy, *In re*, 2 Jur. N. S. 452, p. 167.
 Stuyvesant *v.* Peckham, 3 Edw. Ch. 579, p. 268.
 Sulliard's Case, Rolls Rep. 459, p. 147.
 Sullivan *v.* Pearson, 19 L. T. N. S. 430; L. R. 4 Q. B. 153; 9 Best & Smith, 960, p. 625.
 Surgett *v.* Byers, Hemp. 715, p. 465.
 Sutherland, *In re*, 1 Dowl. 573, p. 116.
 Suydam *v.* Vance, 2 McLean, 99, pp. 486, 494, 497, 529.
 Swain *v.* Senate, 2 New Rep. 99, pp. 623, 625.
 Swannell *v.* Ellis, 8 Moore, 340; 1 Bing. 347, pp. 484, 490, 493, 494, 498.
 Sweet *v.* Bartlett, 4 Sand. 661, pp. 606, 611.
 Sweet, *In re*, 20 Pick. 1, p. 198.
 Sweeney *v.* King, 35 Eng. L. & Eq. 100, p. 457.
 Swinburne, *Ex parte*, 3 Dea. 396, p. 614.
 Swift *v.* Perry, 13 Ga. 138, p. 254.
 Swinfen *v.* Chelmsford, 5 Hurl. & N. 890, pp. 57, 393, 395, 491, 536.
 v. Swinfen, 25 Law J. Com. P. 306, pp. 52, 393, 395, 399, 491.
 Syle, *Ex parte*, 1 Cal. 331, p. 628.
 Symes *v.* Nipper, 12 Ad. & E. 277*n*, pp. 505, 557, 571.
 Symmes *v.* Major, 21 Ind. 433, p. 369.
 Symonds *v.* Mills, 8 Taunt. 526, p. 608.
 Symons *v.* Blake, 2 Crompt. M. & R. 416; 1 Gale, 182, pp. 613, 616.

T.

- Taafe *v.* Downes, 3 Moore P. C. C. 41, pp. 143, 168.
 Tabram *v.* Horn, 1 Moody & R. 228, pp. 327, 330, 608, 610.
 Talbot *v.* McGee, 4 Mon. 377, pp. 403, 509.
 Tallcott *v.* Bronson, 4 Paige, 501, pp. 609, 625.
 Tally *v.* Reynolds, 1 Ark. 99, pp. 327, 341.
 Tankersly *v.* Anderson, 4 Desaus. 45, p. 380.
 Tanner *v.* Lea, 4 M. & G. 617; 5 Scott N. R. 237, p. 540.
 Tapley *v.* Coffin, 12 Gray, 420, pp. 580, 584.
 Tarbell *v.* Dickinson, 3 Cush. 346, p. 254.
 Tatham *v.* Lewis, 65 Pa. 65, p. 527.
 Taunton *v.* Goforth, 6 Dowl. & R. 384, p. 614.
 Taylor, *Ex parte*, 4 Barn. & C. 341, pp. 85-89, 98, 136.
 Taylor *v.* Armstead, 3 Call. (Va.) 200, pp. 512, 513.
 v. Bank, 14 Ala. 633, p. 455.
 v. Bates, 5 Cowen, 376, pp. 177, 445, 447, 512, 513.
 v. Blacklow, 3 Bing. N. C. 235, 421, pp. 254, 274, 313, 448, 466, 516, 517, 519, 44.
 v. Clarke, 13 Ir. C. L. 571, p. 50.
 v. Foster, 2 Car. & P. 195, pp. 262, 291.
 v. Fuller, Ca. Pr. C. P. 64, p. 200.
 v. Gorman, 4 I. R. Eq. 550, pp. 476, 492, 520.
 v. Harris, 4 Barn. & Ald. 93, p. 312.
 v. Hodgson, 3 Dowl. & L. 115; 10 Jur. 355; 14 Law J. Q. B. 310.
 v. Popham, 15 Ves. Jr. 72, pp. 608, 628.
 Tebbs, *Ex parte*, 9 D. P. C. 151, p. 95.
 Templar *v.* McLachlan, 2 New. Rep. 136, pp. 504, 506, 571.
 Tenney, *Ex parte*, 2 Duv. 351, p. 81.
 Terhune *v.* Colton, 10 N. J. Eq. 21, p. 374.
 Terrall *v.* Bank, 12 Ala. 502, p. 407.
 Thalhimer *v.* Brinkerhoff, 3 Cowen, 623, pp. 163-165, 587.
 Tharratt *v.* Trevor, 7 Ex. 161; 21 Law J. Ex. 59, p. 176.
 Thatcher *v.* D'Aguilar, 11 Ex. 436, pp. 140, 345.

- Thayer *v.* Sherman, 12 Mass. 441, p. 514.
 Thomas, *In re*, 11 Week. R. 341, pp. 87, 96.
 Thomas *v.* Harris, 27 Law J. Ex. N. S. 353, pp. 52, 396.
 v. Hewes, 2 Crompt. & M. 327, p. 405.
 v. Hewes, 2 Crompt. & M. 519, p. 395.
 v. Kinsey, 8 Ga. 421, p. 389.
 v. Roberts, 5 Dana, 189, p. 152.
 v. Steele, 22 Wis. 207, pp. 338, 343, 354.
 Thompson, *In re*, 20 Beav. 545, p. 526.
 Thompson, *Ex parte*, 3 L. T. N. S. 317, p. 611.
 Ex parte, 3 Hawks, 355, pp. 91, 79, 94, 162.
 Thompson *v.* Blackburn, 1 Nev. & M. 277, p. 337.
 v. Falk, 1 Drew. 21, p. 292.
 v. Gordon, 4 Dowl. & L. 49, pp. 160, 134, 136.
 v. Kilborne, 28 Vt. 750, pp. 276, 285.
 v. Moore, 1 Dowl. N. S. 283; 5 Jur. 1009, p. 201.
 v. Wilson, 29 Ga. 539, p. 284.
 v. Whitman, 18 Wall. 467, pp. 350, 356, 357.
 Thorn *v.* Lawson, 6 Tex. 240, p. 81.
 Thornton, *In re*, 2 D. P. C. 156, p. 173.
 Thorp *v.* Fowler, 5 Cowen, 446, p. 436.
 Thursby *v.* Warren, Cro. Car. 160, pp. 58, 558.
 Thurston *v.* Percival, 1 Pick. 415, pp. 164, 165, 549, 580, 587, 590.
 Thwaites *v.* Mackerson, 3 Car. & P. 341; M. & M. 199, pp. 444, 480, 483, 493, 497, 509, 545, 589.
 v. Roe, 3 Dowl. & R. 226, p. 174.
 Tiffany *v.* Lord, 40 How. Pr. 481, pp. 379, 404.
 Tilleard, *In re*, 23 Law J. Ch. 765; 11 Week. R. 764; 8 L. T. N. S. 587, p. 544.
 Tilley, *Ex parte*, 2 Rose, 83, p. 621.
 Tillinghast, *Ex parte*, 4 Pet. 108, p. 149.
 Tillman *v.* Reynolds, 48 Ala. 365, p. 628.
 Tillotson *v.* McCrillis, 11 Vt. 477, p. 514.
 Tippack *v.* Bryant, 63 Mo. 580, p. 354.
 Tipping *v.* Johnson, 2 Bos. & P. 357, pp. 424, 427, 431, 436.
 Tisdale *v.* Beddington, Noy, 168, p. 164.
 Titterton *v.* Sheppard, 3 Dowl. & L. 775, p. 138.
 Tompkins, *In re*, W. W. & D. 569, p. 95.
 Tomlinson *v.* Brittlebank, 1 Har. & W. 573, p. 250.
 Toms *v.* Powell, 6 Esp. 40, p. 623.
 Torrey *v.* Payne, 1 Barn. & Adol. 660, p. 626.
 Tosland, *Ex parte*, 31 Beav. 488, p. 546.
 Toulmin *v.* Steere, 3 Mer. 228, p. 408.
 Towle *v.* Hatch, 43 N. H. 270, p. 234.
 Townley, *Ex parte*, 3 D. P. C. 39, pp. 183, 184.
 Townly, *Ex parte*, 3 Dowl. 40, pp. 153, 155.
 Townly *v.* Jones, 8 Com. B. N. S. 289, p. 489.
 Trasmull *v.* Shropshire, 22 Tex. 327, p. 173.
 Treadway *v.* Company, 40 Iowa, 526, p. 389.
 Treasurer *v.* McDowell, 1 Hill, (S. C.) 184, p. 405.
 Treat *v.* Jones, 28 Conn. 334, pp. 557, 572.
 Tremper *v.* Wright, 2 Caines, 102, p. 417.
 Trenchard, *Ex parte*, 9 Law R. Q. B. 406, p. 89.
 Treson *v.* Pearman, 3 Barn. & C. 799, p. 492.
 Trist *v.* Child, 21 Wall. 441, p. 557.
 Trotter *v.* Latson, 7 How. Pr. 261, p. 293.
 Trotter *v.* Smith, 59 Ill. 240, p. 457.
 Trowbridge *v.* Weir, 6 La. An. 706, p. 61.
 Trumbull *v.* Nicholson, 27 Ill. 189, pp. 402, 405, 411, 486, 509.
 Truby *v.* Seybert, 12 Pa. 101, p. 389.
 Truett *v.* Wainright, 4 Gilman, 420, p. 355.
 Trustees *v.* Cowen, 5 Paige, 570, p. 234.
 Trust *v.* Repoor, 15 How. Pr. 570, p. 430.
 Tucker, *In re*, 9 D. P. C. 661, p. 94.
 Tucker *v.* Henniker, 41 N. H. 317, p. 211.
 v. Neck, 4 Bing. (N. C.) 113; 6 D. P. C. 239; 3 Hodges, 242, p. 547.
 Turner, *In re*, 8 Law R. C. P. 103, p. 160.
 Turner *v.* Caruthers, 17 Cal. 431, p. 343, 347, 349, 370.
 v. Commonwealth, 2 Met. 619, p. 161.
 v. Deane, 3 Ex. 839, p. 615.
 v. *In re*, 5 De Gex, Macn. & G. 540; 24 Law J. Ch. 71, p. 546.
 v. Gibson, 2 Ves. 558, p. 614.
 v. Myers, 23 Iowa, 391, pp. 565, 566.
 v. Phillips, Peake's Ca. 122, pp. 50, 51, 536.
 v. St. John, 3 Cold. 376, p. 152.
 v. Bailton, 2 Esp. 474, p. 316.
 v. Reynall, 14 Com. B. N. S. 528, p. 560.
 v. Roylton, 2 Esp. 474, pp. 282, 299.
 v. Tennant, 10 Jur. 429, pp. 574, 589.
 Turney *v.* Bailey, 34 Beav. 105, p. 316.
 Turquand *v.* Knight, 2 Mees. & W. 101, pp. 257, 273, 288, 291.
 Turton *v.* Barber, Law R. 17 Eq. 329, pp. 254, 269, 275.
 Turwin *v.* Gibson, 3 Atk. 719, pp. 605, 606, 607, 609, 610.

Twort *v.* Dayrell, 13 Ves. 295, pp. 428, 433.
 Twynnam, *Ex parte*, 8 D. P. C. 293, p. 95.
 Tyack's Case, Skin. 1; 2 Mod. 340, p. 619.
 Tyson *v.* Ironmonger, 1 Wils. 30, p. 174.
 Tyrrell *v.* Bank of London, 10 H. L. Cas. 26; 8 Jur. N. S. 849; 31 Law J. Ch. 369; 10 Week. R. 359; 9 L. T. N. S. 1, pp. 456, 465.

U.

Union Bank *v.* Geary, 5 Peters, 98, pp. 412, 413.
 v. Georgetown, 5 Peters, pp. 99, 378.
 v. Govan, 18 Miss.; 10 Smedes & M. 333, p. 414.
 United States *v.* Callender, Whart. St. Tr. 688, p. 213.
 United States *v.* Curry, 6 How. 100, p. 437.
 United States *v.* Porter, 2 Cranch C. C. 60, p. 140.
 Unwin *v.* Robinson, Barnes, 53, p. 205.
 Unthank, *Ex parte*, 2 Moore & P. 453, p. 88.
 Uppendale *v.* Lightfoot, Sayers, 117, p. 339.
 Uxbridge, *Ex parte*, 6 Ves. 425, p. 620.
 Uzee *v.* Biron, 6 La. An. 565, p. 574.

V.

Vail *v.* Conant, 15 Vt. 314, p. 383.
 v. Jackson, 13 Vt. 314, p. 397.
 Vaillant *v.* Dodermead, 2 Atk. 524, pp. 253, 254, 262, 287, 312, 316.
 Vale *v.* Oppert, Law Rep. 10 Ch. Ap. 340, p. 605.
 Valentine *v.* Stewart, 15 Cal. 387, pp. 221, 442, 455, 465, 587.
 Valpy, *In re*, Law Rep. 7 Ch. 289, p. 520.
 Van Alta *v.* McKinney's Exrs. 1 Harris, 235, pp. 548, 549, 556, 558.
 Vane, Trial of, 6 St. Tr. 153, p. 164.
 Vann, *In re*, 15 Com. B. 341; 3 Com. Law, 126, p. 539.
 Van Rensselaer *v.* Sheriff, 1 Cowen, 443, pp. 221, 224.
 Vansandeau *v.* Browne, 9 Bing. 402, 2 Moore & S. 543, pp. 437, 491, 521, 525, 526, 560, 570, p. 330.
 v. Burt, 1 Dowl. & R. 168, p. 628.
 Van Wart *v.* Wolley, Ryan & M. 4, p. 389.
 Varnum *v.* Bellamy, 4 McLean, 87, p. 380.
 v. Martin, 15 Pick. 450, pp. 476, 483, 490, 494, 497.
 Vaughn *v.* Davies, 2 H. Bl. 440, pp. 608, 609, 627.

Vaughn, *Ex parte*, W. W. & D. 46, p. 87.
 Velas *v.* Downer, 21 Vt. 419, pp. 549, 568, 573.
 Venable's Case, Cro. Car. 11, p. 198.
 Vent *v.* Parcey, 4 Russ. 193, pp. 292, 269.
 Vetchell *v.* Clark, 5 Mass. 309, p. 607.
 Vincent *v.* Bodardo, 2 Kebb, 199, p. 329.
 v. Groom, 1 Chit. 182, pp. 231, 443, 497.
 v. Slaymaker, 12 East, 372, p. 542.
 Viney *v.* Chaplin, 2 De Gex & J. 468; 4 Jur. N. S. 619; 27 L. J. Ch. 434, p. 381.
 Vise *v.* Hamilton Co. 19 Ill. 18, 78, pp. 75, 324.
 Volant *v.* Soyer, 13 Com. B. 231; 22 Law J. Com. P. 83, pp. 299, 311.
 Von Wallhoffen *v.* Newcomber, 10 Hun. 236, p. 479.
 Voorhees *v.* Dorr, 51 Barb. 580, p. 164.
 Voorhies *v.* Harrison, 22 La. An. 85, p. 420.
 v. McCartney, 51 N. Y. 387, p. 233.
 Vosper, *Ex parte*, 4 Best & Smith, 901, p. 88.
 Voss *v.* Bachop, 5 Kans. 67, pp. 445, 446, 515.

W.

Wader *v.* Powell, 31 Ga. p. 405.
 Wadeson *v.* Smith, 1 Stark. 324, p. 541.
 Wadsworth *v.* Hamshaw, 2 Brod. & B. 5, pp. 253, 254, 290.
 Wadsworth *v.* Marshall, 2 Crompt. & J. 665, pp. 437, 521, 491, 515, 526.
 Wadworth *v.* Allen, 1 Chit. 186, p. 152.
 Wagstaff *v.* Wilson, 4 Barn. & Adol. 339, pp. 378, 388, 392, 393, 394.
 Waight *v.* Burrows, 3 Com. B. 343, p. 625.
 Waine *v.* Kempter, 1 Fost. & F. 695, p. 519.
 Wakefield *v.* New Bar, 6 Q. B. 276, pp. 613, 617.
 Wakeham *v.* Hazleton, 3 Barb. Ch. 148, p. 477.
 Wakeman *v.* Gowdy, 10 Bosw. 208, p. 497.
 Walcott *v.* Vouchee, 3 Bing. 423, pp. 427, 438.
 Walden *v.* Bolton, 55 Mo. 405, p. 388.
 Waldron's Case, 2 Strange, 1126, p. 618.
 Waldron *v.* Ward, Style, 449, pp. 253, 376.
 Walford *v.* Fleetwood, 14 Mees. & W. 449; 3 Dowl. & L. 271, p. 204.
 Walker *v.* Clay, 21 Ala. 797, p. 585.
 v. Corlett, 1 D. P. C. 61, p. 137.
 v. Cuthbert & Stanley, 10 Ala. 213, p. 593.
 Walker, *Ex parte*, 6 Jur. N. S. 687, p. 546.

- Walker v. Goodman, 21 Ala. N. S. 647, pp. 491, 494, 503, 516.
 v. Goodrich, 16 Ill. 341, pp. 335, 417, 523.
 v. Holmes, 22 Wend. 614, pp. 218, 219, 220.
 v. Rogan, 1 Wis. 597, p. 326.
 v. Rushberry, 9 Price, 16, pp. 197, 198.
 v. Sargeant, 14 Vt. 247, pp. 610, 612.
 v. Scott, 13 Ark. 252, p. 405.
 v. State, 4 W. Va. 749, pp. 146, 152, 155, 158.
 v. Stevens, 79 Ill. 193, p. 507.
 v. Wildman, 6 Madd. 47, pp. 254, 266, 290, 292, 308.
 Wall v. Cockerell, 10 H. L. Cas. 229, pp. 464, 467.
 Wallace v. Scales, 6 Ohio, 429, p. 235.
 Wallace, In re, Law R. 1 P. C. 283, p. 146.
 Waller v. Fowler, 1 Sausse & S. 369, p. 437.
 v. Lacey, 1 Man. & G. 54; 1 Scott N. R. 186, p. 629.
 Wallis v. Loubat, 2 Denio, 607, pp. 176, 549, 558, 579, 587.
 Wallis, Ex parte, 8 Jur. N. S. 913, p. 87.
 Walmsley v. Booth, 3 Atk. 25, pp. 433, 451, 457, 467, 468, 548.
 Walpole's Administrators v. Carlisle, 32 Ind. 415, pp. 474, 480.
 Walpole v. Bishop, 31 Ind. 156, pp. 511, 513.
 v. Carlisle, 32 Ind. 415, pp. 483, 487, 493.
 Walradt v. Maynard, 3 Barb. 584, pp. 415, 515.
 Walsh v. Shumway, 65 Ill. 471, p. 556.
 v. Trevanian, 15 Sim. 577, pp. 44, 316.
 Walsingham v. Goodricke, 3 Hare, 124, pp. 290, 292.
 Walters v. Sykes, 22 Wend. 566, pp. 383, 412.
 Walton v. Dickerson, 7 Pa. 376, pp. 610, 615.
 Walton, Ex parte, 5 Barn. & Adol. 824, p. 224.
 Walton v. Sugg, Phill. N. C. 98, p. 430.
 Walworth v. Henderson, 9 La. An. 339, p. 367.
 Wanham, Ex parte, 21 Week. R. 104, pp. 395, 396, 397.
 Warburton v. Edge, 9 Sim. 508; 1 Sim. & St. 457, p. 615.
 Ward v. Heppel, 15 Ves. 297; 16 Ves. 164, p. 622.
 v. Hollins, 14 Md. 158, p. 385.
 v. Lee, 13 Wend. 41, p. 506.
 Warde v. Nethercoate, 7 Taunt. 145, p. 339.
 v. Warde, 5 Eng. L. & Eq. 217, pp. 274, 294.
 Wardell v. Eden, 2 Johns. Cas. 121, p. 408.
 Wardle v. Nicholson, 1 N. & Nev. 335; 4 Barn. & Adol. 469, p. 544.
 Wardsworth v. Marshall, 2 Crompt. & J. 665, p. 560.
 Ware v. Baird, 12 Md. 318, p. 284.
 Warfield v. Campbell, 35 Ala. 349, p. 241.
 Warne v. Kempster, 1 Fost. & F. 695, p. 508.
 Warner v. Griswold, 8 Wend. 665, pp. 417, 506, 523.
 v. Heiden, 28 Wis. 517; S. C. 9 Am. R. 515, p. 573.
 v. Hoffman, 4 Edw. 381, p. 572.
 Warner, Ex parte, 7 Jur. 1016, p. 41.
 Warren v. Cunningham, 1 Gow. p. 71, 541.
 v. Eddy, 13 Abb. Pr. 30, p. 438.
 v. Hawkins, 49 Mo. 137, p. 457.
 v. Paine, 3 Barb. Ch. 213, pp. 221, 223.
 v. Sprague, 4 Edw. Ch. 416, p. 455.
 Warren, In re, 1 Har. & W. 113, pp. 151, 154.
 Washington v. Johnson, 7 Humph. 458, p. 412.
 Waters v. Grace, 23 Ark. 118, p. 610.
 v. Whittemore, 22 Barb. 593, pp. 81, 176.
 Watson v. Bank, 5 Rich. 159, pp. 150, 181, 357.
 v. King, 3 Com. B. 608, pp. 390, 391.
 v. Mercer, 8 Peters, 88, p. 69.
 v. Muirhead, 57 Pa. 161, pp. 480, 483, 507, 518, 520.
 v. Murriell, 1 Car. & P. 307, pp. 235, 236.
 v. Reynolds, 1 Moody & M. 1, p. 520.
 Watts v. Blaney, 1 Dowl. & L. 203; 7 Jur. 854, p. 173.
 v. Collins, 1 Ryan & M. 284; 2 Car. & P. 71, p. 545.
 v. Porter, 3 El. & B. 743, pp. 484, 493, 508, 515, 520.
 Watts, Ex parte, 1 D. P. C. 512, p. 137.
 Weathers v. Roe, 4 Dana, 474, p. 382.
 Weaver v. State, 24 Ohio, N. S. 584, p. 215.
 Webb, Ex parte, 4 D. & D. 641, p. 98.
 Webb v. Baird, 6 Ind. 13, p. 324.
 v. Browning, 14 Mo. 354, pp. 549, 553, 556, 558, 585, 564.
 v. Hopp, 14 Mo. 354, p. 549.
 v. Rhodes, 3 Bing. N. C. 732; 4 Scott, 497, p. 559.
 v. Taylor, 1 Dowl. & L. 676; 8 Jur. 39, p. 201.
 Webber v. Nicholas, 5 L. J. P. C. 19, p. 608.
 Weed v. Bond, 21 Ga. 195, p. 586.
 Weeks v. Argent, 16 Law J. N. S. Ex. 210, pp. 256, 280, 44.
 Weiss v. New Orleans, 10 La. An. 46, p. 379.
 Weld v. Crawford, 2 Stark. 585, p. 545.
 Welch v. Pribble, 1 Dowl. & R. 215, pp. 82, 99.

- Welland *v.* Truman, 1 Bos. & P. 629, 205.
 Welles *v.* Trahern, Willes, 240, p. 197.
 Wells *v.* Hatch, 43 N. H. 246, pp. 438, 610.
 v. Middleton, Cox, 112, 125, pp. 450, 459, 467, 589, 166.
 Welsh *v.* Cochran, 63 N. Y. 181, p. 384.
 v. Hole, 1 Doug. 338, pp. 605, 606, 608, 609, 622, 614.
 Wenans *v.* Lindsey, 1 How. (Miss.) 537, p. 378.
 Wendell *v.* Lewis, 8 Paige, 613, p. 569.
 v. Van Rensselaer, 1 Johns. Ch. 544, pp. 453, 462, 469, 486.
 West *v.* Bull, 12 Ala. 340, pp. 380, 405.
 v. Houston, 3 Har. (N. J.) 15, pp. 312, 344, 345.
 v. Raymond, 21 Ind. 305, pp. 457, 458, 587.
 Western *v.* Council, 2 Peters, 449, p. 79.
 Westaway *v.* Frost, 17 Law J. N. S. Q. B. 286; pp. 368, 523, 140, 151.
 Wetherbee *v.* Ezekial, 25 Vt. 47, p. 254.
 Weymouth, *Ex parte*, 5 Dowl. & L. 60, p. 98.
 Whatley, *In re*, 20 Beav. 576, p. 544.
 Whatton, *Ex parte*, 5 Barn. & Ald. 824, p. 182.
 Wheatley *v.* Williams, 1 Mees. & W. 553, pp. 259, 288, 294, 308, 310, 319, 307.
 Wheeler's Case, 1 Wils. 298, p. 198.
 Wheeler, *Ex parte*, 3 Ves. & B. 21, p. 545.
 Wheeler *v.* Hill, 16 Me. 329, p. 286.
 v. Pounds, 24 Ala. 472, p. 164.
 v. Williard, 44 Vt. 640, pp. 457, 465.
 Whelan *v.* Whelan, 3 Cowen, 537, p. 452.
 Whitcher, *In re*, 13 Mees. & W. 549; 2 Dowl. & L. 407, p. 546.
 White *v.* Bank of United States, 6 Hamm, 539, p. 478.
 White, Case of, 6 Mod. 18, p. 142.
 White *v.* Gainer, 2 Bing. 23, p. 621.
 v. Harlow, 5 Gray, 463, p. 615.
 v. Haffaker, 27 Ill. 349, pp. 224, 455.
 v. Hildreth, 13 N. H. 104, p. 383.
 v. Lady Lincoln, 8 Ves. 363, p. 44.
 v. Roberts, 4 Dana, 172, pp. 580.
 v. Royal, 1 Bing. 21, p. 612.
 v. Teal, 12 Ad. & E. 106, p. 624.
 v. Washington, 1 Barnes, 302; 2 Barnes, 4, pp. 232, 474, 477, 483.
 v. Whalley, 40 How. Pr. 353, p. 460.
 Whitechurch *v.* Worthington, Ca. Pr. 66, p. 329.
 Whitehead *v.* Ducker, 11 Smedes & M. 98, pp. 625, 629.
 v. Greetham, 2 Bing. 464, pp. 44, 508, 519, 521.
 v. Kennedy, 7 Hun. 230, p. 457.
 Whitehead *v.* Lord, 7 Ex. 591; 21 Law J. 239, pp. 329, 335, 424, 437, 438, 525, 560.
 v. Low, 7 Ex. 691, p. 579.
 Whitfield *v.* Moojen, 1 Fost. & F. 290, p. 162.
 Whiting *v.* Barney, 30 N. Y. 330, pp. 253, 254, 261, 289, 315.
 Whitney *v.* Ex. Co. 104 Mass. 152, p. 507.
 Wieland *v.* White, 109 Mass. 392, pp. 378, 382, 398.
 Wickham *v.* Conkling, 8 Johns. 20, p. 163.
 Wigg *v.* Rook, 6 Mod. 86, p. 329.
 Wigg *v.* Simonton, 12 Rich. 583, p. 242.
 Wiggins *v.* Peppin, 2 Beav. 403, pp. 329, 343.
 Wilcox *v.* Executors, 4 Peters, 172, p. 482.
 v. Plummer, 4 Peters, 172, pp. 44, 472, 509, 529.
 Wiley *v.* Pratt, 23 Ind. 628, p. 360.
 Wilkins *v.* Anderson, 11 Pa. 399, p. 215.
 v. Stridger, 22 Cal. 231, p. 390.
 Wilkinson *v.* Grant, 18 Com. B. 319; 25 Law J. Com. P. 233, p. 333.
 v. Griswold, 12 Smedes & M. 669, pp. 479, 507, 524.
 v. Holloway, 7 Leigh, 277, pp. 380, 401, 405.
 Willand, *Ex parte*, 11 Com. B. 544, p. 183.
 Willard *v.* Danville, 45 Vt. 93, pp. 420, 421.
 v. Goodrich, 31 Vt. 597, p. 410.
 Willer *v.* Portland, 3 Ves. 494, p. 166.
 Willett *v.* Chambers, Cowp. 814, p. 44.
 Williams *v.* Barber, 4 Taunt. 193, p. 542.
 v. Butler, 35 Ill. 544, pp. 347, 360.
 v. Douglas, 5 Beav. 83, p. 182.
 Ex parte, 4 Durn. & E. 496, p. 545.
 Ex parte, 28 Beav. 465, p. 162.
 v. Faith, 1 Doug. 189, pp. 544, 563.
 v. Fitch, 18 N. Y. 550, pp. 258, 271.
 v. Fowler, 1 McClel. & T. 269, p. 563.
 v. Gibbs, 5 Ad. & E. 208, pp. 438, 475, 488, 495, 496.
 v. Griffith, 2 Dowl. N. S. 281; 10 Mees. & W. 125, p. 539.
 v. Jones, 5 Barn. & C. 108, pp. 224, 557, 562.
 v. Mundie, 1 Ryan & M. 31; 1 Car. & P. 158, pp. 253, 254, 269, 290.
 v. Nash, Hardw. 131, p. 329.
 v. Nicholas, 1 Dowl. N. S. 841, p. 543.
 v. Odell, 4 Price, 279, pp. 545, 548.
 v. Protherall, 5 Bing. 309, p. 164.

- Williams v. Reed, 3 Mass. 405, pp. 422, 444, 441, 494, 498.
 v. Smith, 14 Com. B. N. S. 596, 241, 242.
 v. Tatnell, 29 Ill. 553, p. 407.
 Williamson v. Moriarty, 19 Week. R. 819, p. 466.
 v. Sammons, 34 Ala. 691, p. 163.
 Willmont v. Meserole, 48 How. Pr. 430, pp. 137, 220.
 Wills v. Kane, 2 Grant Cas. 60, pp. 556, 572.
 Wilmerdings v. Fowler, 14 Abb. Pr. N. S. 249; S. C. 45 How. Pr. 142, pp. 174, 175.
 Wilmott v. Elkington, 1 Nev. & M. 749, p. 172.
 Wilson v. Bank, 6 Leigh, 570, p. 356.
 v. Burr, 25 Wend. 586, pp. 549, 558, 563.
 v. Coffin, 2 Cush. 316, pp. 483, 497, 503, 511.
 v. Godlove, 34 Mo. 337, p. 279.
 v. Gotteridge, 4 Dowl. & R. 737; 3 Barn. & C. 157, p. 545.
 v. Jennings, 3 Ohio St. 528, p. 412.
 v. Knapp, 8 Dowl. 426, p. 100.
 v. Northrop, 4 Dowl. 441, p. 159.
 v. Railroad, Law. R. 14 Eq. 477, p. 288.
 v. Rastall, 4 Term Rep. 759, pp. 257, 263, 264, 265, 313, 315, 320.
 v. Russ, 7 Shep. 420, p. 571.
 v. Round, 4 Giff. 416; 10 Jur. N. S. 34; 12 Week. R. 402; 9 L. T. N. S. 675, p. 611.
 v. Spring, 64 Ill. 14, p. 392.
 v. State, 16 Ind. 392, pp. 221, 454.
 v. Trout, 7 Johns. Ch. 25; 2 Cow. 195, p. 254.
 v. Tucker, 3 Stark. 154, pp. 518, 520, 508.
 v. Turner, 1 Taunt. 398, pp. 388, 392, 408.
 v. Young, 9 Barr. 101, p. 404.
 Wilton, In re, 13 Law J. Q. B. 17, pp. 546, 547.
 Winchester v. Grovesnor, 48 Ill. 517, p. 350.
 Windsor v. Herbert, 7 Mees. & W. 375; 9 D. P. C. 237; 5 Jur. 730, p. 539.
 Winkelman v. People, 50 Ill. 449, pp. 155, 161.
 Winn v. Crosby, 52 How. Pr. 174, p. 607.
 Winter v. Payne, 6 Durn. & East, 645, pp. 539, 545.
 Winter, Ex parte, 1 Barn. & Ald. 190n, p. 97.
 Witt v. Ames, 11 Week. R. 751; 8 L. T. N. S. 425, p. 431.
 Withers v. State, 36 Ala. 252, pp. 142, 146, 155.
 Wright v. Baldwin, 51 Mo. 269, p. 577.
 Wright v. Burroughs, 3 Com. B. 344; 4 Dowl. & L. 266, p. 609.
 v. Castle, 3 Mer. 12, p. 178.
 v. Cobleigh, 21 N. H. 339, p. 610.
 v. Daley, 26 Tex. 730, p. 405.
 v. Ligon, 1 Hart. Eq. 166, p. 526.
 v. Mayer, 6 Ves. 280, p. 286.
 v. Meek, 3 Iowa, 472, p. 589.
 v. Parker, 10 Iowa, 342, p. 377.
 v. Proud, 13 Ves. 138, pp. 450, 452.
 v. Walker, 30 Ark. 44, p. 460.
 Woburn v. Henshaw, 101 Mass. 193, pp. 258, 288, 293.
 Wolf v. Trochelman, 5 Robt. 611, pp. 427, 438.
 Wolley, In re, 11 Rush, 95, pp. 151, 181.
 Wood's Case, 7 Leigh, 743, p. 215.
 Wood's Case, 1 Hopk. Ch. 6, p. 73.
 Wood v. Dawes, 18 Ves. 128, p. 164.
 v. Downs, 18 Ves. 127, pp. 450, 451, 459.
 v. Douries, 18 Ves. 120, p. 589.
 v. Griffith, 1 Swanst. 56, p. 164.
 v. Hopkins, 2 Pen. (N. J.) 689, pp. 381, 425.
 v. Plant, 1 Taunt. 45, pp. 326, 434.
 v. Thornby, 38 Ill. 464, p. 315.
 Woods v. Woods, 4 Hare, 83, p. 264.
 Woolwright, Ex parte, 1 Har. & W. 517, p. 94.
 Worman, In re, 1 Hurl. & C. 636; 32 Law J. Ex. 83; 11 Week. R. 26; 7 L. T. N. S. 249, p. 179.
 Worrall v. Johnson, 2 Jacob & W. 218, pp. 609, 612, 613, 616.
 Worsley v. Scarborough, 3 Atk. 392, p. 407.
 Worton v. Smith, 6 J. B. Moore, 110, p. 312.
 Wright's Case, 12 Com. B. N. S. 705, pp. 155, 161.
 Wright v. Meek, 3 Greene, 472, p. 165.
 Wyatt v. Buell, 47 Cal. 624, p. 216.
 Wycoff v. Bergen, 2 Cox, 214, p. 414.
 Wylie v. Cox, 15 How. 415, pp. 556, 580, 598, 610, 628.
 Wyllie v. Pollen, 32 Law J. Ch. 782; 11 Week. R. 1081, pp. 333, 408.
 v. Phillips, 4 Scott. 474; 5 D. P. C. 644; 3 Bing. (N. C.) 776, p. 377.
 Wynn v. Wilson, Hemp. 688, p. 350.
 Wynne v. Wynne, 2 Scott, N. R. 615; 9 D. P. C. 396, p. 427.

Y.

- Yale, Ex parte, 24 Cal. 241, pp. 68, 75.
 Yardley, v. Elliott, Hob. 8, p. 220.
 Yates v. Freckleton, 1 Doug. 623, pp. 44, 375, 377.
 v. Horanson, 7 Robt. 12, p. 364.
 v. Lansing, 5 Johns. 283, pp. 143, 169.
 Yeatman, Ex parte, 4 Dowl. O. S. 304; 1 Har. & W. pp. 510, 174, 589.

- | | |
|---|--|
| <p>Yoakum <i>v.</i> Tilden, 3 W. Va. 167, p. 403.
 Yoe <i>v.</i> People, 49 Ill. 410, p. 214.
 Yordon <i>v.</i> Hess, 15 Johns. 492, pp. 257,
 261, 263, 311, 314.
 Young <i>v.</i> Dearborn, 27 N. H. 324, pp.
 610, 625.
 <i>v.</i> Dowlman, 3 Younge & J. 24,
 p. 100.
 <i>v.</i> English, 13 Law J. Ch. N. S.
 75, p. 613.
 <i>v.</i> Walker, 16 Mees. & W. 446,
 pp. 539, 575.</p> | <p>Young <i>v.</i> Wright, 1 Campb. 140, pp. 388,
 389, 390.
 Young, <i>Ex parte</i>, 13 Q. B. 663, p. 95.</p> |
|---|--|

Z.

- | | |
|--|--|
| <p>Zabel <i>v.</i> Schroder, 35 Tex. 308, p. 310.
 Zeigler <i>v.</i> Hughes, 55 Ill. 288, pp. 454,
 457, 460, 465.</p> | <p>Zug <i>v.</i> McLaughlin, 23 Ind. 170, p.
 441.</p> |
|--|--|

INDEX.

INDEX.

13 Ann. Law Review 358

NOTE.—The reference is to the page of the volume.

A.

Abandonment—of suit, liability for, 525.

Abode of client—compelling disclosure as to, 170.

Accounts—rendering, notifying client as to, 445, 468.

Accounting—and payment, 514.

Acting in excess of authority—liability for, 236.

Acting in other capacities—224.

Acting for unqualified persons—224.

Actions for fees—531.

See LIABILITY OF CLIENT.

Actions on undertakings—liability to, 235.

Acts done—liability for, 239.

Address of client—disclosing, 312.

Admission to practice—80-125.

admission, 80.

admission and permission to practice essential, 81.

old regulations as to admission and practice in England, 82.

the articulated clerks of England—persons contracting, 84.

service under the articles, 86.

continuous service, 88.

holding other offices, 89.

service under partners, 89.

affidavit necessary, 90.

assignment and discharge of articles, 90.

disputes between clerk and master, 91.

the application to practice under the English system, 92.

examination and admission, 93.

the certificate, 97.

registration of names, 98.

practicing in the names of each other, 99.

effect of want of qualification, 99.

readmission, 100.

statutory regulations in England, 100.

solicitors under the Supreme Court of Judicature Acts, 106.

Colonial Attorney's Relief Act, 1874, 107.

statutory regulations in Ireland, 108.

statutory regulations in Scotland, 115.

statutory regulations and rules in the United States, 115.

in the United States Supreme Court, 116.

in Alabama, 117.

in Arizona Territory, 119.

Admission to practice—Continued.

- in Arkansas, 120.
- in California, 120.
- in Dakota Territory, 123.
- in Illinois, 124.
- in Iowa, 124.
- in Nevada, 125.
- in New York, 125.
- in Pennsylvania, 130.

Admission in France—16.**Admission of barristers—in England, 26.****Admission of women—as attorneys, 76.****Admission—general license by reason of, 341.****Admissions—of attorneys, as binding the client, 388.**

- implied admissions, 393.
- admissions to prove attorney's own authority, 393.
- admissions of clerks, 394.
- recalling admissions, 394.
- whether privileged, 304.

Adverse party—effect of attorney's acts as against, 387.**Adverse retainer—duty of disclosing, 444.****Advocates—17, 38.**

- in Rome, 2.

Affidavit—answering matters of, 179.**Agents—retainer by, 333.****Agreements—extortionate, 464.****American bar—difference between English and, 33.****Ancient mode of appearance—by attorney, 335.****Appearance by attorney—and authority to appear, 335–370.**

- ancient mode of appearance, 335.
- appearance at the civil law, 340.
- general license by reason of admission, 341.
- presumption of authority to appear, 342.
- adverse party may presume authority, 345.
- denial of authority—requiring its production, 346.
- effect of authorized appearance, 349.
- unauthorized appearance—dismissal of suit, 351.
- judgments obtained through unauthorized appearance, 352.
- interference with judgment by court of equity, 354.
- collateral attack, 355.
- unauthorized appearance—foreign and domestic judgments, 355.
- effect of unauthorized appearance on innocent third parties, 360.
- question of attorney's pecuniary responsibility, 361.
- laches, 365.
- appearance for a portion of several parties or for all parties, 366.
- appearance for a partnership, 367.
- appearance by attorney in appellate courts, 367.
- defendant's remedy against attorney, 368.
- remedy of the party whose name is used, 369.
- withdrawal of appearance, 369.
- practice, 370.

Application to practice—in England, 92.**Appropriation—of money by attorneys, 510.**

- of payments on account of compensation, 628.

- Arbitrate**—authority to, 403.
- Argument of counsel**—privilege of, 205-216.
 under control of court, 210.
 confined to evidence, 211.
 on the law, 211.
 comments on persons and their actions, 211.
 limiting time of, 215.
 responsibility of counsel in, 215.
 publication of, 216.
- Arrest**—privilege from, 198.
- Articles**—defects in, 161.
- Articled clerks in England**—84-91.
- Assignment of debt**—as affecting compensation, 583.
- Assignments**—fraudulent, to deprive attorney of his fees, 599.
- Associates**—negligence of, 507.
- Athenian courts**—2.
- Attachments**—against attorneys, 180.
- Attorneys and counsellors at law**—historical sketch of, 1-36.
 definitions and classifications, 37-61.
 See DEFINITIONS.
 vocation, nature of the office, 62-79.
 See VOCATION.
 admission to practice, 80-131.
 See ADMISSION.
 summary jurisdiction over, 132-195.
 See SUMMARY JURISDICTION.
 privileges as officers of the court, exemptions, 196-217.
 See PRIVILEGES AND EXEMPTIONS.
 disabilities by reason of their profession, 218-228.
 See DISABILITIES.
 liability to third parties, 229-250.
 See LIABILITY TO THIRD PARTIES.
 privilege of professional communication, 251-321.
 See PRIVILEGED COMMUNICATIONS.
 retainer and authority to appear, 322-371.
 See RETAINER AND APPEARANCE.
 authority and powers, 372-439.
 See AUTHORITY AND POWERS.
 duties and dealings with client, 440-469.
 See DUTIES AND DEALINGS.
 liability of attorneys to clients, 470-530.
 See LIABILITY, NEGLIGENCE.
 liability of client to attorney, 531-631.
 See LIABILITY OF CLIENT.
- Attorneys**—women as, 76.
- Authority and powers**—of attorneys, 373-439.
 results flowing from the retainer, 373.
 law of principal and agent applicable, 373.
 authority and powers, 374.
 things that an attorney may do by virtue of his general retainer, 376.
 things an attorney may not do by virtue of his general retainer without
 special authority, 380.
 control over conduct of suits and proceedings, 385.
 when attorney may exercise his discretion, 386.

Authority and powers—Continued.

- binding effect of attorney's acts as against the adverse party, 387.
- authority to make admissions binding upon the client, 388.
 - implied admissions, 393.
 - attorney's admissions to prove his own authority, 393.
 - admissions of clerks, etc., 394.
 - recalling admissions before judgment, 394.
- authority to compromise litigated claims, and to make settlements, 394.
 - negligent compromise, 400.
 - notice of want of authority to compromise, 401.
 - no compromise after judgment, 401.
- authority to demand and receive payment, 401.
- authority to refer or submit to arbitration, 403.
- collateral matters, 405.
- authority to stipulate that cause of action shall not abate, 406.
- authority to stipulate for continuance, 406.
- authority to receive notices, 407.
- effect of judgment on authority, 409.
- control over judgment and execution, 410.
- authority to satisfy judgment, 413.
- vacating judgment, 413.
- authority after judgment, 414.
- auxiliary proceedings, 415.
- authority of law partners, 415.
- authority of law clerks, 417.
- authority to employ substitutes, 418.
- ratification by the client, 422.
- duration of authority, 423.
- termination of the relation and of the authority, 425.
 - by revocation of authority, and change and substitution of the attorney. General rules, 426.
 - in England, 430.
 - in United States, 434.
 - change after judgment, 436.
 - effect of the substitution on the attorney changed, 436.
 - by withdrawal of attorney, 437.
 - by death of attorney or client, 438.

Authority to appear—322.

See APPEARANCE.

Authority—liability for acting in excess of, 139, 236, 508, 509.

Authorized appearance—effect of, 349.

Auxiliary proceedings—authority over, 415.

Avocats—15.

Avoues—15.

Awards—attorney's lien on, 631.

B.

Bail—restrictions as to becoming, 218.

Barratry—162, 596.

Barristers—162.

Bills of cost—under the English system, 538-548.

Blunders in process—attorney's liability for, 476.

- Books of attorney**—525.
Both parties—appearing for, 220.
 employment by, 447.
Burden of proof—as to privileged communications, 267.
 in cases of negligence, 492.

C.

- Calling to the bar**—in England, 27.
Care—required from attorney, 471-480.
Champerty—164, 586-599.
 See **CONDITIONAL AND CONTINGENT FEES**.
Change of attorney—426-436.
 effect on compensation, 604.
Choses in action—purchasing, 221.
Civil law—advocates in, 38, 340.
Classifications—37-61.
 See **DEFINITIONS**.
Clerks—admissions of, 394.
 powers of law, 417.
 privileged communications to, 290.
Client—protected in communications to counsel, 292.
 ratification by, 422.
 liability to attorney, 531.
 See **LIABILITY OF CLIENT**.
Co-defendants—correspondence between, whether privileged, 315.
Collateral matters—and privileged communications, 308.
 authority in, 405.
Collection and appropriation of money—510.
Collecting money—duties as to, 445.
Collusive settlements—and attorneys' liens, 622.
Colonial attorney's relief act—107.
Commissions—for collecting money, 598.
Communications—held privileged, 268.
 not privileged, 275.
 See **PRIVILEGED COMMUNICATIONS**.
Compensation—of attorneys, 531.
 See **LIABILITY OF CLIENT**.
Compromise—attorney's power to, 394.
 negligent, 400.
 notice of want of authority to, 401.
 none after judgment, 401.
 propositions to, whether privileged, 316.
Conditional and contingent fees—586-599.
 contracts held champertous, 590.
 contracts held not champertous, 594.
 maintenance and barratry, 596.
 contingent fee not within Statute of Frauds, 597.
 right to contingent fee as against attaching creditor, 597.
 contract of indemnity, 598.
 merger of the contract, 598.
 death of client, 598.
 commissions for collecting, 598.

Conditional and contingent fees—*Continued.*

fraudulent assignments, 599.

measure of damages, 599.

Conflicting interests—454.**Contempts**—by attorneys, 180-185.**Contingent fees**—586-599.See **CONDITIONAL FEES.****Continuance**—authority to agree to, 406.**Contract of retainer**—332.**Contracts for fees**—579-599.

new, after retainer, 601.

Control—over suits, 385.**Control of court**—over argument, 210.**Conveyancers**—privileged communications to, 290.**Corporations**—retainer by, 333.**Costs**—summarily imposing, 178.

attorneys' liability for, 231.

bills of, 538-548.

Counsel—54.

right to, 323.

Criminal cases—rule as to privileged communications, 319.**Cross-examination of attorneys**—287.**D.****Dealings with client**—450-469.

transactions upheld, 452.

transactions not upheld, 453.

conflicting interests, 454.

mixing funds, 456.

purchase of client's property, 456.

instances, 460.

exceptions to the rule, 462.

extortionate agreements, 464.

purchase of subject-matter of controversy, 465.

purchase of claims, 465.

information received from client, 466.

investment of moneys, 466.

gifts from client, 467.

rendering accounts, 468.

Death of party—effect on retainer, 335.**Death of attorney or client**—438.**Death of attorney**—effect on compensation, 598.**Deeds**—privileged communications, applied to, 298.**Defects in articles**—161.**Definitions and classifications**—37-61.

different designations applied to lawyers, 37.

advocates, 38.

attorney at law, 41.

barrister, 44.

counsel, 54.

lawyer, 54.

proctor, 54.

Definitions and classifications—Continued.

serjeant at law, 55.

solicitor, 57.

use of terms, 59.

Delivery of documents—171.**Demands for suit—purchasing, 221.****Denial of authority—to appear, 346.****Diligence—required from attorney, 471-480.****Disabilities of attorneys—218-228.**

restrictions as to becoming bail or surety, 218.

as to appearing for both parties, or on opposite sides, 220.

as to purchasing choses in action or demands for suit, 221.

as to acting in other capacities, 224.

as to acting for unqualified persons, and permitting others to use their names, 224.

when counsel in a cause may be a witness, 225.

competency as a witness generally, 228.

opinions as an expert on matters connected with his specialty, 228.

Disbarring—140.

See STRIKING FROM ROLLS.

Disclosures—as to abode or occupation of client, 170.**Discretion—when attorney may exercise his, 386.****Dismissal of case—effect on compensation, 603.****Dissolution of partnership—effect on retainer, 335.****Documents—compelling delivery of, 171.**

whether privileged, 293.

Domestic judgments—and unauthorized appearance, 355.**Duration of authority—423.****Duties toward client—440-450.**

how the attorney is to fulfill his trust, 440.

degree of fairness and good faith required, 441.

legal duties toward client, 443.

duty of disclosing adverse retainer, 444.

duties in preparing for trial, 444.

duty as to notifying client as to rendering accounts, 445.

duties in collecting money, 445.

payment of money, 447.

duties as to sales of real property—employment by both parties, 447.

what the attorney undertakes to do in making a purchase, 448.

duties as to investigating titles, 449.

E.**Employment of attorney—333.**

evidence of in actions for fees, 565.

Employment—by both parties, 447.**England—change of attorney in, 430.**

admission in, 100-107.

compensation of attorneys in, 535-548.

Equitable interference—to protect attorney's lien, 624.**Equity causes—privileged communications in, 266.****Establishing proof—of relation, 326.****Evidence—in cases of negligence, 498.**

Evidence—*Continued.*

in actions for fees, 561-567, 569.

Examinations—in the inns of court, 29.

of attorneys in England, 93.

Excess of authority—acting in, 236.**Execution**—control over, 410.**Exemptions**—196-218.

See PRIVILEGES OF ATTORNEYS.

Expert—opinions as an, 228.**Express contract**—compensation under, 581.**Extortionate agreements**—464.**Extra professional communications**—317, 319.

F.

Fairness and good faith—required from attorneys, 441.**Federal courts**—privileged communications in, 266.**Fees**—liability for, 231.

actions for, negligence as a defense to, 503.

effect of non-payment of, 520.

Fees of attorney—531.

See LIABILITY OF CLIENT.

Foreign judgments—and unauthorized appearance, 355.**Fraudulent transactions**—rule as to privileged communications as applied to, 304.

assignments to deprive attorney of his compensation, 599.

French bar—10, 12.

G.

Gifts from client—467.

I.

Ignorance of the law—liability for, 477.**Implied admissions**—393.**Implied obligation**—to pay attorney's fees, ⁵560.**Indorsement of writ**—liability for, 234.**Information received from client**—466.**Inns of court**—21.

regulations as to legal education, 26.

admission of students, 26.

keeping terms, 27.

calling to the bar, 27.

certificate to practice under the bar, 28.

lectures and examinations, 29.

Interpreters—privileged communications to, 290.**Investment of moneys**—466, 517.**Investigation of titles**—liability for, 517.**Ireland**—admission to practice in, 108.

J.

Joint liability—of attorney and client, 242.

Judgments—obtained by unauthorized appearance, 352.

equitable control over, obtained by unauthorized appearance, 354.
collateral attack, 355.

foreign or domestic judgments, unauthorized appearance, 355.

effect of, on authority, 409.

and execution, control over, 410.

authority to satisfy, 413.

authority to vacate, 413.

authority after, 414.

Judicature acts—of England, 106.

solicitor's fees under, 536.

Judiciary—responsibility of, for striking from the rolls, 167.

Jurisconsults—6.

L.

Laches—in cases of unauthorized appearance, 365.

Law—argument on the, 212.

Lectures and examinations—in the inns of court, 29.

Liability of attorneys—to their clients—negligence—remedies of clients
against their attorneys by action, etc., 470-528.

liability to client, 470.

what skill, care, and diligence required, 471.

skill required, 473.

liability for mistakes, 475.

liability for blunders in process and formal proceedings, 476.

liability for ignorance of the law, 477.

effect of locality on the rule, 479.

attorney not expected to guarantee success, 480.

care required, 480.

diligence required, 480.

liability for negligence, 483.

neglect of attorney is neglect of client as to third parties, 485.

usual remedy, 485.

legal and equitable actions, 487.

negligence in conduct of a cause, 488.

position of burden of proof in cases of negligence, 492.

instances of negligence, 492.

pleading and evidence in actions for negligence, 498.

sufficient count in an action for negligence, 502.

negligence as a defense to an action for fees, 503.

negligence of associates, 507.

liability for matters not litigated, 507.

liability for acting in excess of authority, 508.

liability for acting without authority, 509.

collection and appropriation of money, 510.

payment of money, 513.

A. & C.—44.

Liability of attorneys—Continued.

- accounting and payment, 514.
- liability for disclosing secrets, 516.
- investigation of titles—investment of money—sufficiency of securities, 517.
- advice as to titles, 520.
- effect of nonpayment of fees, 520.
- liability of law partners, 523.
- attorneys' books, 525.
- liability for abandonment of suit, 525.
- other liabilities, 526.
- not liable for acts not within the scope of their profession, 526.
- measure of damages, 527.
- Statute of Limitations, 528.

Liability of clients to attorneys—**I.—Remedy by action.**

- the Roman *honorarium*, 532.
- in the Middle Ages, 534.
- in England, 535.
 - solicitors' fees under the Judicature Acts, 536.
 - solicitors' fees in England under agreements, 536.
 - bills of cost, under the English system, 538.
 - delivery of the bill, 540.
 - requisites of the bill, 542.
 - propriety of the charges, 543.
 - liability to be taxed, 545.
 - referring bill to taxation, 545.
 - taxation of bill independent of statutory provisions, 548.
- compensation in the United States, 548.
- compensation under general retainer, 552.
- actions for compensation, 556.
 - liability of client, 559.
 - implied obligation, 560.
 - pleading and proof, 561.
 - proving retainer—evidence of employment, 565.
 - evidence for plaintiff, 567.
 - evidence for defendant, 569.
 - attorneys' services—when considered as necessities, 572.
 - measure of compensation, 573.
 - statute of Limitations, 579.
- compensation under special agreement, 579.
 - express contract, 581.
 - assignment of debt, 583.
 - agreement for fixed sum in gross, 583.
 - promissory note for services, 585.
- contingent or conditional fees—champerty, 586.
- contracts held champertous, 590.
- contracts held not champertous, 594.
- maintenance and barratry, 596.
- contingent fee not within the Statute of Frauds, 597.
- right to contingent fee as against attaching creditor, 597.
- contract of indemnity, 598.
- merger of the contract, 598.
- death of client, 598.
- commissions for collecting, 598.

Liability of clients to attorneys—*Continued.*

- fraudulent assignments, 599.
- measure of damages, 599.
- compensation of substitutes, 599.
- taking new security for fees pending relation, 600.
- making new contracts for fees after retainer, 601.
- effect of withdrawal from case, 602.
- effect of dismissal of case, 603.
- effect of change of attorney, 604.

II.—The remedy by lien, 605-631.

- lien of attorney, 605.
- two kinds of lien—general and particular, 607.
- the particular or charging lien, 609.
- the general lien, 612.
- the so-called “retaining lien,” 614.
- lien on papers, 615.
- summary jurisdiction over delivery of papers as affecting the lien, 619.
- waiver or loss of the lien, 621.
 - when superseded, 622.
 - collusive settlements, 622.
- remedies on the lien, 623.
 - equitable interference to protect the lien, 624.
 - set-off as against lien, 626.
 - appropriation of payments on account, 628.
 - settlements between the parties as affecting the lien, 629.
 - liens on partnership debts, 630.
 - liens on sums awarded, 631.

Liability to third parties—229-244.

- general liability to third persons, 229.
- liability for costs and fees, 231.
- liability for indorsement of writ, 234.
- liability to actions on undertakings, 235.
- liability for acting in excess of authority, 236.
- liability in cases of malpractice, 238.
- liability for acts done, 239.
- liability for malicious prosecution, 239.
- joint liability of attorney and client, 242.

Liability of third persons to attorneys—244-250.

- slander of attorneys, 244.
- expressions held slanderous, 245.
- expressions held not slanderous, 246.
- other expressions, 246.
- the evidence, 248.

Liability on undertakings—136.**Lien of attorneys—to secure their compensation, 605-631.**

- two kinds of lien, general and particular, 607.
- the particular or charging lien, 609.
- general lien, 612.
- retaining lien, 614.
- lien on papers, 615.
- summary jurisdiction over delivery of papers as affecting the lien, 619.
- waiver or loss of the lien, 621.
- when superseded, 622.
- collusive settlements, 622.

Lien of attorneys—*Continued.*

- remedies on the lien, 623.
- equitable interference to protect the lien, 624.
- set-off as against the lien, 626.
- appropriation of payments on account, 628.
- settlements between the parties as affecting the lien, 629.
- liens on partnership debts, 630.
- liens on sums awarded, 631.

Limitations—Statute of, in cases of negligence, 529.
in actions for fees, 579.

Limiting time—of argument, 215.

Loss of attorney's lien—621, 622.

M.

Maintenance—162, 596.

Malicious prosecution—liability for, 239.

Malpractice—liability for, 238.

Mandamus—to restore attorney to roll, 160.

Measure of damages—in cases of negligence, 527.
in actions for fees, 573, 599.

Measure of compensation—573, 599.

Merger of contracts—for fees, 598.

Middle ages—lawyers in, 9.
compensation in, 534.

Mistakes—attorney's liability for, 475.

Mixing funds—456.

Money—compelling payment of, 173.
investment of, 466.
collection and appropriation of, 510.
payment of, 513, 514.
investment of, 517.

N.

Nature of attorney's office—62-79.

See VOCATION.

Necessaries—attorney's services, when considered as, 572.

Negligence—liability for, 483-507.

- neglect of attorney deemed neglect of client, 485.
- usual remedy, 485.
- legal and equitable actions, 487.
- negligence in conduct of cause, 488.
- position of burden of proof, 492.
- instances of negligence, 492.
- pleading and evidence, 498, 502.
- negligence as a defense to an action for fees, 503.
- negligence of associates, 507.

Negligent compromise—400.

Notice to attorney—notice to client, 407.

O.

Occupation of client—compelling disclosure as to, 170.

Offenses—by attorneys, 187.

Office—nature of attorney's, 62-79.

See VOCATION.

Opposite sides—appearing on, 220.

P.

Papers—in attorney's hands, 171.

lien on, 615.

Parol retainer—329.

Partnership—debts and attorneys' liens, 630.

Partnership—dissolution of, effect on retainer, 335.

Partners—powers of law, 415.

liability of law, 523.

Patron and client—4.

Payment of money—compelling duties as to, 173, 447, 513.

Payment—authority to demand and receive, 401.

Pecuniary responsibility—of attorney in cases of unauthorized appearance, 361.

Permitting others to use names—224.

Pleading—in cases of negligence, 498, 502.

Pleading and proof—in actions for fees, 561.

Practice—restoration to, 154.

striking from rolls, 155.

cases of unauthorized appearance, 370.

Practicing—in other's names, 99.

Preparing for trial—duty as to, 444.

Presence of both parties—effect on privileged communications, 289.

Presumption of authority—to appear, 342-345.

Principal and agent—law of as applied to attorneys, 373.

Privilege of professional communications—252-320.

relative duties, 252.

origin of the rule as to privileged communications, 252.

rule not confined to pending suits, 253.

general rules, 262.

rule in the Federal Courts, 266.

rule in equity causes, 266.

burden of proof, 267.

importance of communication not a test, 267.

injunction of secrecy not necessary, 267.

communications held privileged, 268.

communications held not privileged, 275.

disclosures allowed for protection of attorneys, 283.

professional employment necessary, 284.

but a formal retainer not necessary, 285.

mode of imparting privileged information, 286.

effect of the client's calling the attorney as a witness, 286.

Privilege of professional communications—Continued.

- right of cross-examination of attorney, 287.
- effect of attorney making himself attesting witness, 288.
- effect of the presence of both parties, 289.
- what persons the privilege includes, 289.
- clerks, interpreters, conveyancers, 290.
- client also protected from testifying, 292.
- rule as applied to documents, 293.
 - deeds, 298.
 - testamentary communications, 301.
 - fraudulent transactions, 304.
 - admissions, 304.
 - acts done, 305.
 - matters observed, 307.
 - communications in view of breaking the law, 307.
 - collateral matters, 308.
 - third parties, 311.
 - disclosing address of client, 312.
- privilege not lost by termination of professional relation, 312.
- communications made to legal advisers of two parties jointly, 314.
- correspondence between co-defendants, 315.
- waiver of the privilege, 315.
- propositions to compromise, 316.
- information received extra professionally, 317.
- information not within the scope of professional duty, 319.
- rule in criminal cases, 319.
- course for attorney to pursue when subpoenaed, 320.

Privileges of attorneys—as officers of the court, exemptions, 196–218.

- privilege in general, 196.
- privilege from arrest, 198.
- privilege as to suing and being sued, 202.
- waiver of privilege, 204.
- privilege of counsel in argument, 205.
 - under control of the court, 210.
 - argument to be confined to the evidence, 211.
 - comments on persons and their actions, 211.
 - argument on the law, 212.
 - limiting time of argument, 215.
 - responsibility of counsel in argument, 215.
 - publication of argument, 216.

Process—attorney's liability for blunders in, 476.**Proctors—54.****Production of authority—to appear, 346.****Production of client—requiring, 170.****Promissory note—for services, 585.****Property of client—purchasing, 456–462.****Protection of attorney—disclosures allowed for, 283.****Publication of argument—216.****Purchases—making, 447, 448.****Purchasing choses in action—and demands for suit, 221, 465.****Purchasing client's property—456, 460, 462.****Purchasing subject-matter—of controversy, 465.**

R.

Ratification by client—422.

Readmission in England—100.

Real property—duties as to sales of, 447.

Relation—commencement of, 322.
establishing, 326.

Remedy—in cases of negligence, 485-487.
on attorney's lien, 623.
of defendant against attorney bringing suit without authority, 368.
of party whose name is used, 369.
of attorney against client, 531.

See LIABILITY OF CLIENT.

Responsibility of counsel—in argument, 215.

Responsibility of judiciary—for striking attorney's name from rolls, 167.

Restoration to practice—154.

Restrictions—as to becoming bail or surety, 218.

Retainer—322-335.

commencement of the professional relation, 322.
the right to counsel, 323.
establishing the relation of attorney and client, 326.
the retainer—written or parol, 329.
contract of retainer, 332.
general and special employment, 333.
retainer by one as agent for another, 333.
retainer by corporations, 333.
effect of dissolution of partnership on retainer, 335.
effect of death of party on retainer, 335.
results flowing from retainer, 373.
what attorney may do by virtue of retainer, 376.
what he may not do, 380.
compensation under general retainer, 552.
proving retainer in actions for fees, 565.

Revocation of authority—426.

Right to counsel—323.

Roman lawyers—under the Empire, 7.

Roman honorarium—532.

Rome—advocates in, 2-4.

S.

Sales of real property—duties as to, 447.

Satisfy judgment—authority to, 413.

Scotland—lawyers in, 31.
admission in, 115.

Secrets—liability for disclosing, 516.

Securities—liability for sufficiency of, 517.
taking new, for fees, 600, 601.

Serjeants at law—55.

Service under articles in England—86-89.

- Set-off**—as against attorney's lien, 626.
Settlements—between parties and the attorney's lien, 622, 629.
Skill—required from attorney, 471, 473.
Slander of attorneys—244-250.
Solicitors—57.
Special authority—when necessary, 380.
Special agreement—compensation under, 579-585.
Statute of Frauds—contingent fee not within, 57.
Statutory regulations—as to admission in England, 100, 106, 107.
 Ireland, 108.
 Scotland, 115.
 United States, 115.
 United States Supreme Court, 116.
 Alabama, 117.
 Arizona, 119.
 Arkansas, 120.
 California, 120.
 Dakota, 123.
 Illinois, 124.
 Iowa, 124.
 Nevada, 125.
 New York, 125.
Stipulate—authority to, 406.
Striking from rolls—140-167.
 misconduct authorizing, 150.
 restoration, 154.
 practice, 155.
 whether mandamus will lie, 160.
 for defect in articles, 161.
 at attorney's own request, 166.
 responsibility of judiciary for, 167.
Substitution—of attorney, 426.
Substitutes—employment of, 418.
 compensation of, 599.
Success—attorney not expected to guarantee, 480.
Suing and being sued—privilege as to, 202.
Suits—control over, 385.
Summary jurisdiction—of courts over attorneys, 132-194.
 liability to summary jurisdiction, 132.
 liability on undertakings, 136.
 for acting without authority, 139.
 striking from the rolls, 140.
 instances of misconduct authorizing suspension or disbarring, 150.
 restoration, 154.
 practice, 155.
 whether mandamus will lie, 160.
 striking from rolls for defect in articles, 161.
 barratry, 162.
 maintenance, 162.
 champerty, 164.
 striking from the rolls at attorney's own request, 166.
 responsibility of the judiciary in civil actions for striking an attorney's
 name from the rolls, 167.

Summary jurisdiction—Continued.

- compelling disclosure as to abode or occupation of client—requiring attorney to produce client, 170.
- delivery up of documents, 171.
- papers in attorney's hands for professional purposes, 171.
- compelling payment of money, 173.
- summarily imposing costs, 178.
- answering matters of affidavit, 179.
- contempts—attachments against attorneys, 180.
- contempts in the United States courts, 185.
- miscellaneous offenses, 187.
- statutory regulations in England, 188.
- statutory regulations in Alabama, 189.
- statutory regulations in Arkansas, 191.
- statutory regulations in California, 193.
- statutory regulations in New York, 193.
- statutory regulations in Pennsylvania, 194.
- as affecting the attorney's lien to secure compensation, 619.

Supreme Court of Judicature acts—106.**Surety—restrictions as to becoming, 218.****Suspension from bar—140-167.**

See SUMMARY JURISDICTION AND STRIKING FROM ROLLS.

T.

Taxation of the profession—79.**Taxation of bills of cost—545-548.****Terms—use of, 59.****Terms applied to lawyers—37-61.**

See DEFINITIONS AND CLASSIFICATIONS.

Termination of relation—and authority, 243-425.

effect on privileged communications, 312.

Testamentary communications—whether privileged, 301.**Test-oath cases—64, 71.****Test as to privileged communications—267.****Time of argument—limiting, 215.****Titles—investigating, 449, 517.**

advice as to, 520.

Transactions—with client upheld, 452.

not upheld, 453.

U.

Unauthorized appearance—by attorney, 351.

judgments obtained by, 352, 360.

effect on innocent third parties, 360.

effect of pecuniary responsibility of attorney, 361.

lashes in cases of, 365.

remedy of defendant, 368.

remedy of party whose name is used, 369.

practice, 370.

A. & C.—45.

- Undertakings**—liability on, 136, 235.
United States Courts—admission in, 116.
contempts in, 185.
United States—lawyers in, 31.
legal instruction in, 32.
change of attorney, 434.
admission, 115.
compensation of attorneys in, 548.
Unqualified persons—acting for, 224.
Use of terms—59.

V.

- Vacate judgment**—authority to, 413.
Vocation of the lawyer—62-79.
nature of the office, 62.
test-oath cases, 64, 71.
admission of women as attorneys, 76.
taxation of the profession, 79.

W

- Waiver of privilege**—as to professional communications, 315.
as to attorney's privileges, 204.
Waiver—of attorney's lien, 621, 622.
Withdrawal—of appearance, 369.
of attorney, 437.
effect on compensation, 602.
Witness—calling attorney as a, 286.
lawyer making himself attesting, 288.
when counsel may be, 225.
competency as a, 228.
Women as attorneys—76.
Writ—indorsement of, liability for, 234.
Written retainer—329.

